Judicial Strategy in Insurgencies

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Abstract

This thesis is concerned primarily with the use of law and courts as strategic assets in insurgency. Its subject is 'lawfare'. Recent discourse on insurgency and counterinsurgency has focussed on 'population-centred' activities-the idea of the 'people' as a 'prize'. An indispensible ingredient of any effective government is the ability to adjudicate – usually by a judiciary. At the heart of many insurgencies (not all), is the realisation that the ability to decide disputes and enforce those decisions bolsters legitimacy. The *perceived* ability to do this is important to the narrative of the insurgency.

Counterinsurgents (incumbents) have often concentrated on the security aspect of courts and 'justice'. This can work where there is no competitive system in operation in the operational area. This was so during supposedly successful operations by the British in the 1950s. Even in such cases there is the potential for what is termed here 'rupture' and 'disruptive litigation' where incumbent courts may be used to blunt both operational effectiveness and even the legitimacy of incumbent rule.

When insurgents set up competing justice systems within their own communities, provided that these are seen as 'fair', they may be highly effective. Indeed some insurgencies, sometimes with causes rooted in the vital matter of land, have levered their ability to adjudicate and enforce into power. The role of courts goes well beyond land however, as the cases of the Irish War of Independence (in Western Europe), and the Afghan Taliban (in so-called 'ungoverned space') have demonstrated.

Often knowledgable colonial incumbents ruled through delegated authority in so-called 'ungoverned' (or 'differently governed') space. They were acutely aware of the importance of 'lawfare'. Whilst the applicability of lessons drawn from those experiences should not be overstated, they should not be ignored. A brief study of the west's efforts areas of Afghanistan demonstrates some of these factors. Attempts to impose an alien system there ask the quesion 'who really is the insurgent?'

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INTRODUCTION

Kingdoms are won and lost in the realms of law and legitimacy[1]

This introduction is divided into two sections: the first is an outline of the background to this thesis, its objectives and general overview; the second is aimed at introducing the concept underlying the main body of the thesis – specifically insurgency – by way of a review of the literature moving from definitions and critical approaches to insurgency and counterinsurgency and courts and insurgents.

Section 1

In his study of warfare in the eighteenth century, *The Verdict of Battle*, James Q. Whitman describes the institution of pitched battle in his period as 'a form of trial ... a contained and economical way of resolving a dispute between two warring parties or countries'.[2] He saw battle and war in that period as a form of legal process. The idea of warfare, or more widely armed combat, as a form of legal proceeding was also a feature of combat in the Middle Ages.[3]

The objective of this thesis is to demonstrate that matters have progressed from battle, perhaps, being seen as a 'trial or legal proceeding'[4] to legal processes themselves being a form of warfare. That insight itself is not particularly new. As will be described below, the concept has been refined into the word 'lawfare'. However, one of the original ideas that this thesis seeks to encapsulate as its contribution to learning and scholarship is the degree to which the use of law and legal procedures has long been a tool of *insurgent* and *counterinsurgent* warfare – a weapon, no less.

David Kennedy in his *War and Law* states:

> In large measure, our modern politics is legal politics; the terms of engagement are legal, and the players are legal institutions, their powers expanded and limited by law … To say that war is a legal institution is not only to say that war has also

[1] Whitman, James Q., *The Verdict of Battle* (Harvard University Press, 2012), p94
[2] ibid. p3
[3] Whetham, David, *Just Wars and Moral Victories: Surprise, deception and the normative framework of European war in the later middle ages* (Brill, 2009). See particularly Chapter III 'The role of law as a legal instrument in the middle ages', p71
[4] Whitman, *The Verdict of Battle,* p3

> become an affair of rules or the military a legal bureaucracy. It is also to say something about the nature of the politics continued by military means.[5]

This is certainly true of warfare today. Law has become a part of modern warfare. Like cyberspace, 'legal space' has become a key battlefield, and combatants are still feeling their way around it. It is not new in nature: at the tactical level – the level at which soldiers operate – the law has long been an environment within which soldiers have had to work. In 1837, General Napier put the officer's dilemma with black humour:

> Confronted by a mob, his thoughts dwell on the (to him) most interesting question; 'shall I be shot for my forbearance by a court-martial, or hanged for over-zeal by a jury'.[6]

At the strategic level, however, the necessity of ensuring a sound, coherent judicial strategy has not been fully realised in insurgency warfare. This thesis seeks to show the importance for both insurgents and those who oppose them of developing and implementing a sound and coherent 'judicial strategy'.

Background

The genesis of this project lies in my work. Since the mid-1990s, I have worked in many countries and regions as an advisor on the development of institutions of justice: the Balkans, Iraq, the Central Asian states, Afghanistan, Libya and Ethiopia. Occasionally I have been called up to be deployed as a reserve military officer, in the Balkans and Iraq,. Almost every country in which I have worked has been either in the middle of conflict or recovering from it.

Upon my return from Afghanistan, I wrote two articles. The first was published in the *RUSI Journal*, the second in the *Journal of the Royal Society for Asian Affairs*.[7] In those pieces I suggested that despite a plethora of reports streaming from Afghanistan on the justice sector, and the efforts being put in to reform it, very little had been written on its role in

[5] Kennedy, David, *Of War and Law* (Princeton University Press, 2006), p13
[6] Cited in Townsend, Charles, *Britain's Civil Wars* (Faber, 1986), p20
[7] Ledwidge, Frank, 'Justice in Helmand: the challenge of law reform in a society at war', *Asian Affairs*, 40:1 (2009), p40; Ledwidge, Frank, 'Justice and counter-insurgency in Afghanistan: a missing link', *RUSI Journal*, 154:1 (2009), pp6–9

both powering and countering insurgency. The focus of the work being done in the sector had been on assessing and critiquing (largely negatively) the international efforts so far – often only from the point of view of development and the so-called 'security sector', mainly the police and military. I suggested that within the world of 'counterinsurgency' the justice sector was, at best, a poor cousin of the Security Sector Reform field. The strong implication was that the justice sector should take a far more prominent role in the effort to 'stabilise' Afghanistan. It was not simply another 'social good', such as hospitals or roads, but was intimately bound up with concepts of legitimacy and justice. It was a key element, in other words, of any insurgency with political ambitions – which is to say, all of them.

By the same reasoning, in the end any successful counterinsurgency operation, if it has ambitions of political effect, must take steps – or, more importantly, be seen to take steps – to address the legitimate grievances that insurgents use to generate and sustain popular support. A corrupt, discredited justice system only serves to fuel an insurgency that bleeds legitimacy from the government in key strategic areas of the country; and in current counterinsurgency thinking, 'legitimacy' is a vital component of the overall effort.

The articles suggested that while the central importance of justice had to some extent eluded counterinsurgency (COIN) theorists at that time, successful insurgents had often historically placed it at or near the top of their objectives.

The parameters of this thesis

While there is some discussion of the use of law and courts at home to influence operations overseas, the focus is on courts within the theatre of operations of the insurgency.

This thesis deals with insurgency, not terrorism. While some see what used to be called the 'global war on terror' as a 'global insurgency', others see it as such only on the terms of the jihadists waging this 'war'. The idea is accepted here that insurgency is a 'popular movement that seeks to change the status quo through violence and subversion whilst

terrorism is one of its key tactics'.[8] This thesis is concerned with insurgencies largely, though not exclusively, with objectives that do not relate to a notional 'world caliphate', but rather with achievable and defined political aims usually within a national context. In other words, this thesis locates 'insurgency' where it has generally been located throughout history. This does not imply that such struggles take place only within the borders of a given country. As will be seen, successful insurgencies generally have transnational elements.

The title of the thesis 'Judicial Strategy in Insurgencies' is inspired by a work of the radical French lawyer Jacques Verges.[9] The idea behind it is that as part of a successful struggle, the insurgent (or indeed any contemporary combatant) may have at his disposal, in addition to military or indeed propaganda means, legal means that (if correctly used) may assist in the achievement of the insurgency's objectives. Equally, though, by virtue of being a functioning state, the counterinsurgent already has the legal weapon at his disposal. He, too, will require a legal strategy and, in the absence of one, the way is laid open for the insurgent to fill the gap. This gap may not only be in the context of maintaining security. Security is a necessary though not sufficient precondition for an insurgent to use the justice weapon, and the fight for that ground takes place at least partly in the judicial realm.

Methodology

The bulk of the work done for this thesis has been literature based. Original research has been carried out in law libraries (on the colonial and Irish legal experiences – see Chapter 2). There has been some archival work, and I believe such work (specifically concerning Malaya, Kenya and Cyprus) has not been done before. From the literature perspective, a great many disparate secondary sources have been consulted.

While I had hoped to carry out significantly more research in the field, particularly in Afghanistan, security concerns precluded this. Such research in the field as I have done (in Afghanistan, Ethiopia and Libya) appears more as background, with occasional reference in the relevant sections, rather than empirical evidence.

Due partly to the changes in the security situation, I shifted the theme of the thesis from a focus on the current conflicts in Afghanistan and Pakistan to a more global and rather more

[8] Kilcullen, *The Accidental Guerilla* (Hurst, 2009), p15
[9] Verges, Jacques, *De la Strategie Judiciare* (Minuit, 1968)

historical emphasis. I have also carried out a number of interviews with key actors in the field of justice and insurgency. These were conducted in the United Kingdom or over Skype.

The greatest challenges that have been encountered relate to the paucity of evidence in the literature. Very little work has been done on the interfaces of lawfare and insurgency. The original contribution this thesis aims to make to scholarship is to demonstrate how the law and courts may often be a vital asset, or even weapon in complex, developed insurgencies.

Research questions

The intention of this thesis was to take those thoughts further and examine what impact courts (by which is meant agreed dispute resolution mechanisms, which include so-called 'informal systems') have had on insurgency and counterinsurgency. As will be seen, such systems range from the *shuras* of Pashtun Afghanistan or the *xeer* of the Somali lands, involving a few men sitting under a tree, to the highly technical supreme courts in well-developed societies such as the United Kingdom and the United States. While the focus is on insurgencies in the late twentieth and early twenty-first centuries, reference will be made to events further back in the past, for example the United States Civil War and the English Civil War of the 1640s.

Research question: How does the use of courts and dispute resolution systems as characterised in the term 'lawfare' impact on the conduct and outcome of insurgency?

A second question that flows from the first is **what does the use of courts and dispute resolution mechanisms tell us about the validity of contemporary counterinsurgency ideas as a doctrine or set of tactics?** Traditional (or even current) counterinsurgency posits at its centre that the great bulk of the effort must concentrate on civilian efforts. Clearly justice, as a theme, must be a key, perhaps even pivotal, element in this effort. In recent years, the use of courts in the various 'counterinsurgencies' fought by the UK and others has focused on security aspects. Indeed this is the function of criminal courts. There is, of course, far more to courts than crime, as will be seen. Courts and mechanisms of justice also go to the heart of questions of legitimacy, which are said to be central to current ideas of COIN.

Finally, if the 'west' is to continue involving itself in 'insurgencies, or indeed any 'interventions', what can the 'justice sector' and its intersection with counterinsurgency

contribute towards attempting to ensure success in whatever strategic objectives are set (or seem to be set). **What in terms of 'judicial strategy' can assist intervening powers to succeed in their objectives?** On occasion, such objectives may well be concerned with assisting, rather than countering, insurgencies. Indeed Western powers are engaged in doing exactly that in Syria, and are using the provision of 'justice' to do so.[10]

Chapter summaries

Following this introduction and a review of the literature on insurgency in general, to the extent that it is relevant to insurgency and lawfare, Chapter 1 moves on to an overview of matters within the field of insurgency studies that are relevant to the conduct of legal warfare in insurgency. First, it has been said that lawyers have almost entirely ignored counterinsurgency theory.[11] It is equally true that insurgency experts have all too readily overlooked the relevance of law to their field. Section 1 looks at this often ignored vital element of the law in insurgency. Section 2 moves on to confirm the relevance of law and society to insurgency. Section 3 discusses the 'key battleground' of legitimacy: what is legitimacy, and how can it be acquired and maintained? Current thinking on 'why people obey the law' is discussed, and an excursion into jurisprudence provides a foundation for later material on legal pluralism. Section 4 briefly introduces the idea, central to the thesis, of 'lawfare'; and Section 5 continues that line of thinking by examining how lawfare affects the key domain of narrative.

Chapter 2 focuses on how counterinsurgent, or what Stathis Kalyvas calls 'incumbent' government courts may be used by parties in insurgencies. In 2012, Thomas Nachbar wrote: 'Law has a dual use in counterinsurgency, both as a tool for defeating criminal insurgents themselves (by imprisoning them) and as a means for governments to build legitimacy.'[12] Counterinsurgents have two basic options, characterised by what this thesis has called 'Kitson's Dilemma': namely, shall the law be used as a weapon, or as a means of bolstering legitimacy. Section 1 of the chapter examines how the courts were used, in this case by the

[10] The UK's Department for International Development is, at the time of writing, engaged in a programme called 'Syria Tamkheen', operating out of Turkey. Its objectives are community security, and one component is to 'encourage' human rights compliant courts among the insurgent groups

[11] Sitaraman, Ganesh, 'Counterinsurgency, the war on terror, and the laws of war', *Virginia Law Review*, 95:7, (2009), p1747

[12] Nachbar, Thomas B., 'The use of law in counterinsurgency', *Military Law Review*, 213 (2011), p142

British, in one set of insurgencies in what has been called the 'high' or 'classic' period of counterinsurgency. The differing approaches mirror well the ideas of 'Kitson's Dilemma'. Incumbent Courts may also be used by insurgents, and two main techniques are identified. The first is 'rupture', a term coined by the French radical lawyer Jacques Verges and used to mean having the courts turned against themselves: attempting to expose the internal contradictions of courts that purport to provide justice, but that use injustice in the process. The second is what I call 'disruptive litigation'. This in turn can be divided in two: hostile disruptive litigation (intended to disrupt counterinsurgent operations); and non-hostile (in that while the effect may be disruptive, the intent is not necessarily hostile). The damage that can potentially be done to incumbent operational capability by disruptive litigation has yet fully to be realised.

From the use of litigation, Chapter 3 moves on to look at the use of courts themselves and at legal institutions as weapons. First, the lack of relevant mechanisms to deal with central issues at stake, such as land or satisfactory justice provision itself, is a driver of insurgency. Particular weight is given in the chapter to insurgent courts. In some ways this is the centrepiece of the thesis, in that it crystallises several matters: the contest for legitimacy, shadow states, the potential for law and the narratives of law to provide strategic effect. Many conflicts are sampled, ranging from the Philippines, by way of Western Sahara, to the Syrian rebels and the Islamic State of today. Two in particular are argued to demonstrate the potential in the right circumstances for 'insurgent justice' to be, if not decisive, then at least essential to success. These are the 'Republican Courts' of the Irish War of Independence (1919–21) and the Afghan Taliban of today.

Contemporary insurgency, such as that within which the Afghan Taliban thrived, is often said to take place within 'ungoverned space', and it is to this topic that Chapter 4 proceeds. While this concept is challenged, there remains an extensive bank of experience, writing and scholarship in dealing with the practice of 'justice' in such areas. A pragmatic commonality of approach was developed by regimes during the nineteenth and early twentieth centuries for development of policy in 'differently governed' areas, ranging from Yemen and Albania to French West Africa, Sudan and the North West Frontier of British India. Unfortunately (it is argued in Chapter 4), recent Western practice in counterinsurgent lawfare has displayed

ignorance – or at least a lack of awareness in practice – of whole fields of scholarship, notably legal anthropology and legal pluralism, which draw heavily on these heritages. The chapter goes on to take the case of the British in Helmand, themselves acting against the Afghan Taliban's provision of justice, as a particular study. It concludes by drawing a series of lessons, which might be summarised by the thought that in such alternatively governed spaces, the counterinsurgent becomes the insurgent.

Section 2

Insurgency and counterinsurgency

The objective of this section is to introduce the concepts relevant to the main body of the thesis by way of a review of the literature. The section begins by looking at what insurgency and counterinsurgency are – or are said to be in 'doctrine'. It looks at the proponents of the ideas that have dominated much of the discourse on war since 2001, and indeed some of the thinking before then. The review will then focus on ideas of justice and rule of law and on how those have been discussed. It will include sections on the literature, such as it is, on insurgent courts.

'Orthodox' doctrine

Over the last decade and a half, and especially since the large-scale interventions in Iraq and Afghanistan, insurgency and its counterpart counterinsurgency (hereafter abbreviated to 'COIN') have been at the very forefront of discussion of military matters. Many books have been written, websites set up,[13] long-out-of-print texts about previously forgotten campaigns have again been sent to press and commentaries have been penned. Indeed very many PhD and other theses such as this have been produced. Before embarking on the central discussion, it may be helpful to outline the parameters of what will follow. What is meant by insurgency? Where does justice fit into it (if at all)? And how does current military, and to a lesser extent political, theory incorporate insurgency and COIN into its ideas? For if nothing else, insurgency – like all forms of warfare – is a political act: insurgencies (or at the very least secular insurgencies) are usually fought in pursuit of political aims.

[13] Most notably *Small Wars Journal* http://smallwarsjournal.com/ Many others along those lines have been set up to promote discussion amongst COIN 'practitioners'

There is an orthodox stream of thinking on this topic that can be seen to flow from the 1920s up to the present day. There have been very many changes to it, but always there is the sense that at the heart of the topic is a focus on the 'people' as the target of both insurgent and counterinsurgent operations. We open by examining what some of this current orthodox doctrine has said about what insurgency actually is today; we then move on to some older texts, before looking at opposing approaches.

One window into what might be described as an insurgency is provided in military doctrine. The US Army/ Marine Corps Manual of Counterinsurgency[14] was drafted in 2006, to great public acclaim, against the backdrop of what was generally perceived as a failing war in Iraq.[15] It contained what was often proclaimed to be a 'new' approach to insurgency – or at the very least a new consolidation of old theories. As military doctrine, the new manual was replete with definitions. It defined an insurgency as follows:

> An insurgency is an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government.[16]

In 2013, a new version was authorised and was published in May 2014.[17] This does not define insurgency at all, but rather takes the nuanced view that 'insurgency' can take place within the context of intrastate conflict with the characteristics of rebellions, insurrections, civil wars and revolutions.[18] It indicates a far more flexible approach than its predecessor.

In 2009, the British Army (as opposed to the UK armed forces as a whole) produced its equivalent of the US Manual.[19] Its definition qualified insurgency as:

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[14] Known hereafter as FM 3-24. It was published in 2006, and an updated version (2013) is available online at http://www.dtic.mil/doctrine/new_pubs/jp3_24.pdf

[15] See, for example, Gordon, Michael, 'Military hones a new strategy on insurgency', *New York Times*, 5 October 2005, available at http://www.nytimes.com/2006/10/05/washington/05doctrine.html?ref=davidhpetraeus&_r=0

[16] US Army and Marine Corps Field Manual (FM 3-24) *Counterinsurgency* (2006 Edition), available online at http://usacac.army.mil/cac2/coin/repository/FM_3-24.pdf, paras 1–2

[17] FM 3-24, *Insurgencies and Countering Insurgencies* (May 2014), available at http://fas.org/irp/doddir/army/fm3-24.pdf

[18] FM 3-24 (2014), paras 4-2–4-9

[19] British Army Field Manual (AFM), Volume 1 Part 10, October 2009, available at http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/16_11_09_army_manual.pdf

> … an organised, violent subversion used to effect or prevent political control as a challenge to established authority.[20]

As we will see, these definitions may be said to differ from traditional legal definitions in that they focus on the objectives of the rebellion, rather than on the actual effect of the rebellion on the ground (although it should be said that, in the absence of a definition, the new US FM 3-24 allows space for a broader response).[21]

It should be noted that the important element in any successful insurgency is the *subversion*, rather than the *supporting* violence. Violence without subversion or without a concomitant political objective is simply criminal activity, although there are theorists who see insurgency and organised criminal activity as shading into one another. David Kilcullen makes an attempt to identify insurgency with some elements of criminal activity or racketeering; he draws strong comparisons between the control exercised by Jamaican drugs gangs[22] and Taliban courts over the people within whom those organisations reside. As we will see below, this is related to his advocacy of an idea that he calls 'the theory of competitive control'.[23]

The key point recognised implicitly in the US version of the definition is the *political element* of the struggle against 'legitimate' government. Those 'subversives' successful in today's struggle will (or intend to) form tomorrow's government; such is the nature of insurgency, as defined in Western doctrine.[24] In those terms, if the premises of the ideas in the various manuals of military doctrine are accepted, success in the struggle is largely dependent on 'offering a better deal' – winning, as it were, the 'competition' for the 'people'. It is not going too far to suggest that insurgency in these terms is, in essence, an attempt to renegotiate the terms of any notional 'social contract', with the intention of giving the insurgency the upper hand.

Both definitions – and indeed the entire corpus of US and UK counterinsurgency doctrine – are concerned with 'insurgency' in countries other than the UK or the US. Insurgency is

[20] AFM 1-10, pp1–4
[21] See section on 'Legal Definition' below
[22] Kilcullen, David, *Out of the Mountains* (Hurst, 2013), pp97–98
[23] Kilcullen, *Out of the Mountains*, p127. See also section below on 'Competitive Control' in chapter 3
[24] See, for example, FM 3-24 (2006), para 1-24: 'In all cases insurgents aim to force political change; any military action is secondary and subordinate'

something that happens elsewhere.[25] There is no hint in either definition of military forces dealing with internal subversive violence of the kind that beset the United Kingdom for 30 years in Northern Ireland. The predicate of both is that US and UK forces will be engaged in putting down, or assisting in putting down, insurgencies that either arise from or are incidental to 'interventions'. This in turn is known as 'third-party' or 'exogenous' counterinsurgency.[26]

The precise approach any government takes to defeat an insurgency depends very much on the character of that government, as we will see below. However, as commonly understood, the term 'counterinsurgency' has developed something of the nature of a doctrine based around the extensive literature on what might be termed 'population-centred counterinsurgency'. Hereafter, the commonly used shorthand COIN will be used to mean 'population-centred counterinsurgency'.

It has been claimed that 'about 80% of all conflicts since the end of the Napoleonic era have been insurgencies or civil wars'.[27] Certainly there have been a great many 'savage wars of peace', a term coined by Rudyard Kipling, incidentally, in his poem 'The White Man's Burden'.[28] David Kilcullen points out that

> since the mid-19th century, in fact, the United States has been drawn into literally dozens of small wars and irregular operations. Even the few conventional wars during this period – including the US Civil War, the Spanish-American War, the First

[25] For example, there is no mention in FM 3-24 of the US Civil War. There is a mention of an 1847 proto-Fenian document advising rebels to 'break up' the 'force of England'; see FM 3-24 (2006 edition), para 3-102
[26] Surke, Ashtri, 'Exogenous state-building: the contradictions of international state-building in Afghanistan', in Whit Mason (ed.), *The Rule of Law in Afghanistan: Missing in inaction* (Oxford University Press, 2011)
[27] Few, Michael, 'This isn't the COIN you're looking for', *Foreign Policy*, December (2011)
[28] The third stanza reads:
Take up the White Man's burden –
The savage wars of peace –
Fill full the mouth of Famine,
And bid the sickness cease;
And when your goal is nearest
(The end for others sought)
Watch sloth and heathen folly
Bring all your hope to nought.

and Second World Wars and the Korean War – involved guerrilla conflict, stability operations, and post-conflict nation-building.[29]

British doctrine

Much of what has been called here 'orthodox' counterinsurgency doctrine is founded on supposed British successes in the wars of imperial retreat of the 1950s. It was in the 1950s that the British reinforced their reputation in fighting the wars that were to become known as 'insurgencies'. One author has referred to this (somewhat poetically) as the 'high period of British counterinsurgency'.[30]

The scholar of British counterinsurgency, Colonel David Benest, says that 'there is no comparable history of counterinsurgency anywhere in the world to match that of the British record'.[31] If by 'comparable history' he means experience, there can be no doubt that this is true. But whether experience has translated into expertise and success is a different matter, and is the subject of several works.[32] Until the recent campaigns in Iraq and Afghanistan, British expertise in such matters was taken for granted. As one of its own doctrinal documents put it, the British Army 'has much to teach a world increasingly challenged by the problem of internal war'.[33] Has it anything to teach about the application of law in the pursuit of legitimacy?

From the accession of Queen Victoria in 1837 to her death in 1901, the British Army fought no fewer than 250 campaigns, large and small.[34] Indeed, since the Second World War, Britain has fought a great many wars: at least one credible study has suggested that it has

[29] Kilcullen, *Out of the Mountains*, p23
[30] Michael Crawshaw, 'The evolution of British COIN', attachment to MOD JDP 3-40 (undated UK Government publication), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/43334/jdp340theevolutionofbritishcoinbymichaelcrawshaw.pdf
[31] Colonel David Benest in 'British Atrocities in counterinsurgency' available at http://www.militaryethics.org/British-Atrocities-in-Counter-Insurgency/10/
[32] For example, Porch, Douglas, *Counterinsurgency: Exposing the myths of the new way of war* (Cambridge University Press, 2013); Nagl, John, *Learning to Eat Soup with a Knife* (University of Chicago Press, 2002); Ledwidge, Frank, *Losing Small Wars* (Yale University Press, 2011)
[33] Mockaitis, Thomas, *British Counterinsurgency in the Post-Imperial era* (Manchester University Press, 1995), p12. Examples of scholars extolling the 'British approach' were plentiful – prior to 2005
[34] Byron Farwell, *Queen Victoria's Little Wars* (Wordsworth, 1999), p364

fought more conflicts than any other country in the world.[35] As for the results, the British Army (like most professions) loves keeping score: in the post-war period, the British have been involved in no fewer than 70 military campaigns (by no means all of them wars) of varying sizes, 18 of which may be classified as 'counterinsurgency' actions. The Army Staff College official handbook on counter-revolutionary warfare gives the tally as seven successes, three partial successes, five failures and one draw (plus two more recent wars ongoing).[36] Many of these struggles were rebellions by people who (or whose rulers) did not wish to be ruled by the Empire. 'So perverse is mankind that every nation prefers to be misgoverned by its own people than to be well ruled by another', as one of the Empire's leading generals, Charles James Napier, put it.[37] This is a theme that will recur throughout this thesis.

In the early twentieth century, the British fought dozens of small campaigns, with greater or lesser degrees of success. They developed techniques which, although sporadically applied, were to become the keynote of a 'British way' of 'counterinsurgency'. These ideas revolved around a strong degree of civil–military cooperation and respect for a basic level of rule of law. It was 'not the annihilation of an enemy but the suppression of a temporary disorder, and therefore the degree of force to be employed must be directed to that which is necessary to restore order and must never exceed it'.[38] In essence this was 'minimum force'.[39] These ideas were developed further in the 1930s, with the publication of a range of books on suppression of rebellion, notably Charles Gwynn's *Imperial Policing* with its focus

[35] See *Human Security Report 2005,* available at: www.hsrgroup.org/human-security-reports/2005/text.aspx. This reports states that Britain was involved in 21 'international conflicts' between 1946 and 2003, ahead of France (19), the United States (16) and the Soviet Union

[36] Army Staff College, *Handbook on Counter-Revolutionary Warfare* (Army Staff College, 1995). In chronological order: Greece (1945–6), Palestine (1945–8), Egypt (1946–56), Malaya (1948–60), Eritrea (1949), Kenya (1952–6), Cyprus (1954–8), Aden (1955, 1956–8), Togoland (1957), Brunei (1962), Borneo (1963–6), Radfan (1964), Aden (1965–7), Dhofar (1970–6), Northern Ireland (1969–2007), Afghanistan (2001 to date) and Iraq (2003 to date). I am grateful to Martin Bayly for allowing me to read his thesis for his Oxford MPhil – 'COINing a new doctrine' (unpublished MPhil thesis, Oxford, 2009) containing this information, and for the insights gained from extensive conversations with this emerging scholar

[37] General Charles James Napier, cited in Farwell, *Queen Victoria's Little Wars* at p 20

[38] *Duties in Aid of the Civil Power* (HMSO, 1923), p3, cited by Thomas Mockaitis, *British Counterinsurgency 1919–1960* (Macmillan, 1990), p18

[39] Only four years before, in 1919, there had been a departure from the concept of minimum force at Amritsar, when General Reginald Dyer had given the order for soldiers to open fire on a demonstrating crowd, killing 379 and wounding over a thousand others. For a discussion of the reality behind the rhetoric, see most recently Mockaitis, Thomas, 'The minimum force debate: Contemporary sensibilities meet imperial practice', *Small Wars and Insurgencies*, 23:4–5 (2012), pp762–780

on minimum force, and HJ Simson's *Rule and Rebellion in the British Empire* with rather more of a stress on the use of force and the enforcement of law.[40]

In his study of UK counterinsurgency doctrine, Colonel Alex Alderson reviews how the UK military framed its thinking over the century or so prior to the Iraq and Afghanistan wars of the early twenty-first century.[41] It is striking that there is a consistency of rhetoric concerning the requirement to comply with legal strictures in 'low intensity' military operations. Alderson affirms that legitimacy and minimum necessary force 'are critical to the British approach to counterinsurgency and have underpinned it since *Duties in Aid of the Civil Power* was published in 1923'.[42] That publication[43] was the first of several official or semi-official doctrinal guidance documents produced between the First and the Second World War. All stressed minimum force, subordination to the civil power and the necessity of compliance with the law, all to ensure the maintenance of support and legitimacy.

Unfortunately, in none of the doctrinal documents or founding texts did there seem to be an indication of what 'legitimacy' actually meant. Even in the British doctrine which supposedly governed the operations of the early twenty-first century, the 2001 edition of 'Counter Insurgency Operations',[44] as Alderson points out 'legitimacy *per se* is not explained at all, neither is the need for British forces to safeguard their own legitimacy through their conduct, nor the evident problems of maintaining, if not re-building legitimacy faced by a government dealing with an insurgency'.[45]

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[40] Gwynn, Major General Sir Charles, *Imperial Policing* (Macmillan and Co., 1936); Simson, HJ *Rule and Rebellion in the British Empire* (Blackwood and Sons 1937)

[41] Alderson, Colonel Alex, 'The validity of British counterinsurgency doctrine after the war in Iraq 2003–2009' (PhD thesis, Cranfield University, 2010), available at: https://dspace.lib.cranfield.ac.uk/bitstream/1826/4264/1/100126-Alderson-PhD%20Thesis.pdf

[42] ibid., p80

[43] *Duties in Aid of the Civil Power*. This 1923 publication was followed in 1934 by *Imperial Policing* by Major General Sir Charles Gwynn (not a formal doctrinal publication) and *Notes on Imperial Policing*, which certainly was published by the War Office (but, says Alderson, possibly also authored by Gwynn), also in 1934. In 1949, *Imperial Policing* and *Duties in Aid of the Civil Power* were published as a single document.

[44] Counter Insurgency Operations, Army Field Manual Volume 1 , Part 10 (2001 edition), available at http://www.scribd.com/doc/53578088/Counter-Insurgency-Operations-UK-Army

[45] Alderson, 'Validity of British counterinsurgency doctrine', p80

There has been extensive questioning of the extent to which there was in fact any working system of transmission of doctrine in any event in the UK's 'small wars'.[46] If in fact doctrine was not consulted, and instead there was a rather more informal transmission of 'institutional knowledge' of the kind promulgated by John Nagl in his *Learning to Eat Soup with a Knife*, it might be asked whether the many writings on British counterinsurgency doctrine could be characterised more as rhetoric than as guidance. Professor Hew Strachan points out in a study of recent military campaigns, *British Generals in Blair's Wars*, 'doctrine may exist, but that does not mean that it is read'.[47]

While principles are easily articulated in doctrine and other military literature, practice is rather more challenging. The British Army of old was not averse to using a very great level of coercion, and was indeed not averse to the occasional atrocity. Indeed, as we will see, it was this kind of behaviour that characterised the British approach in Ireland during the 'War of Independence' (1919–21) – along with an extraordinary degree of chaos in command and control arrangements.[48] The brutality of the 'Black and Tans' irregular military force is remembered today – and the Irish Nationalist response will be examined in the next chapter. The activities of such units as the 'Black and Tans' contributed heavily to British failure in Ireland. In Palestine, between 1936 and 1939, the way in which the first *intifada* –

[46] Cf Kiszely, General Sir John, 'Learning about counterinsurgency', *RUSI Journal*, 151: 6 (2006), pp16–21; Moreman, T.R., 'Small wars and imperial policing: The British Army and the theory and practice of colonial warfare in the British Empire 1919–1939', *Journal of Strategic Studies*, 19: 4 (1996), p105; Rigden, Col I.A. 'The British approach to counter-insurgency: myths, realities, and strategic challenges', USAWC Strategy Research Project, 15 March 2008; Strachan, Professor Hew, , 'British counterinsurgency from Malaya to Iraq', *RUSI Journal*, 152:6 (2007), pp8–11; Wither, James K., 'Basra's not Belfast: The British army, small wars and Iraq', *Small Wars and Insurgencies*, 20:3–4 (2009), pp611–635. See also (more generally) *Small Wars and Insurgencies*, 23:4–5 (2012) *in toto* for a recent set of articles on this topic. All the above articles question the degree to which UK doctrine was incorporated into practice

[47] Strachan, Hew in Bailey, Jonathan, Iron, Richard and Strachan, Hew (eds), British Generals in Blair's Wars (Ashgate, 2013), p336

[48] 'Had I been told, in 1918, after four and a half years of blood-letting, that in our own British Isles I should be witnessing acts of atrocity, by men in the King's uniform, which far exceeded in violence and brutality those acts I lived to condemn in the seething Baltic, I – well, I would have laughed out loud. I am concerned here with the conduct of Englishmen in the uniform of the Crown, because I greatly respect the Crown and have no wish to see it dragged in the mud … I resigned because the combat was being carried out on foul lines, by selected and foul men, for a grossly foul purpose, based on the most Satanic of all rules that "the end justifies the means".' Brigadier Frank Crozier, Commander of the Auxiliary Division of the Royal Irish Constabulary, in Crozier, Frank, *The Men I Killed* (London, 1937), quoted in Benest, 'British atrocities in counterinsurgency'.

otherwise known as the Arab Insurgency – was put down by the British, complete with punitive village clearances and massacres, is still recalled.[49]

As to the prominence or otherwise of justice and law, in his study of British counterinsurgency doctrine Colonel Alex Alderson identifies only rare and fleeting mentions of justice in UK military doctrine, prior to its recent redrafting.[50] As part of what he calls the 'expanding torrent' of realisation that fighting insurgency might require cogent doctrine going beyond the fighting of insurgents, he identifies the 1969 edition of the British Army's *Counter-revolutionary Operations* as a key indicator that the complexity of the insurgency problem was being realised and considered. Unfortunately, the 'justice sector' is aligned in importance with freedom of expression, religion and amnesty plans.[51]

The Army Field Manual Volume 1 Part 10, better known as *Countering Insurgency* is reluctant to address justice in any more than terms that are of little practical consequence. Although an entire chapter is devoted to 'counterinsurgency and the law', most of that chapter deals, rightly, with the basis for intervention (*ius ad bellum*), status of forces agreements,[52] and domestic frameworks. The bulk of the chapter is concerned with the laws and rules of war, such as those relating to the use of force,[53] rules of engagement,[54] types of armed conflict,[55] discipline and detention,[56] and the questioning of prisoners.[57] Internal matters such as the duties of a military legal advisor (LEGAD) take up most of the rest of the chapter.[58] There is a short paragraph on 'rule of law' – but it is of no practical use in terms of the expression of any awareness of the importance of justice.[59] A mere nod is given to analysing 'the perceptions and experiences of local people particularly the poor, women and

[49] Matthew Hughes, 'The practice and theory of British counterinsurgency: the histories of the atrocities at the Palestinian villages of al-Bassa and Halhul, 1938–1939', *Small Wars and Insurgencies,* 20:3 (2009), pp528– 550
[50] Alderson, 'Validity of British counterinsurgency doctrine'
[51] ibid., p130
[52] AFM Vol 1-10, paras 12.2 and 12.4
[53] ibid., para 12.13
[54] ibid., para 12.19
[55] ibid., para 12.10
[56] ibid., para 12.22
[57] ibid., para 12.23
[58] ibid., para 12.29
[59] ibid., para 12.26

marginalised groups'. In practice, no LEGAD will ever analyse anything of that nature. There are few LEGADs on operations who have the time for such matters, or indeed the experience to undertake them.[60]

JDP 3-40 *Security and Stabilisation, the Military Contribution* is a substantial document.[61] It displays a close awareness of the dangers attendant upon allowing insurgents to grab the initiative in the justice sector. Indeed, it quotes an article written by the present author concerning Taliban courts and the effective competition they offer to corrupt state systems.[62] The manual takes a realistic approach to reform of justice, recommending that government efforts should focus on building on existing systems, rather than on inventing new and probably impracticable (not to say inappropriate) structures: 'By building on existing structures, the expansion of governance is more likely to succeed than a system imposed by outsiders.'[63]

With the exception of the UK's JDP on stability operations, there is no mention in the tactical doctrine of the pragmatic necessity of addressing the reality of existing systems and of reflecting on any threat they might present to the mission. One overriding principle – familiar to anyone in any field of international assistance, or indeed any doctor – is (or should be) 'do no harm'. For aid workers, this precept is absolutely central. That 'doing no harm' is a lesson to be drawn from history is explicitly stated in a short but excellent account of British counterinsurgency practice written to supplement JDP 3-40 for the Ministry of Defence by retired Colonel Michael Crawshaw.[64]

COIN methods are predicated on the idea, now called the 'population-centred approach', that the 'people are the prize'[65]– as if they are the subject of a sporting contest. They are, of course, not a 'prize', inert and without autonomy; they are the environment within which,

[60] A statement based on extensive conversations with UK army legal advisors in Afghanistan and elsewhere
[61] UK Ministry of Defence, *Security and Stabilisation: The Military Contribution*, Joint Doctrine Publication 3-40, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/49948/jdp3_40a4.pdf
[62] JDP 3-40, para 615, p172
[63] JDP 3-40, para 617, p173
[64] Crawshaw, 'The evolution of British COIN'
[65] Brigadier Andrew Mackay's command guidance to 52 Brigade, Helmand, October 2007

by definition, 'wars among the people' take place. They live and breathe and have their being. They are dynamic agents. Taking the perspective of a 'counterinsurgency' advocate, albeit within a contemporary framework, David Kilcullen sees the 'people' as manipulators of the counterinsurgent:

> We think of the population as lacking in agency … nothing could be further from the truth; not only are non-combatant civilians in these environments extremely active and highly influential, but they are in many cases masters of manipulation and experts in leveraging the presence of rich, ignorant and gullible outsiders in order to get what they need, outsmart their rivals and survive another day.[66]

This analysis, albeit framed differently is at the heart of Stathis Kalyvas's work on civil war actors.[67] This, it is submitted here, is entirely right. Yet the 'people' are curiously absent from much formal military and academic discourse on insurgency, except as an abstract entity or as 'extras'. This is crucial when matters of justice are concerned – and particularly judicial systems that may not accord with Western paradigms.

Critics of 'COIN' as a concept

Criticism of counterinsurgency is nothing new. A commentator writing in the early 1960s took the view that: 'There is a muddy verbosity and pompous profundity that are beginning to mark the whole subject of counterterrorism and guerrilla war.'[68] The eminent Israeli historian Martin van Creveld has asserted that: 'The first, and absolutely indispensable, thing to do is throw overboard 99 percent of the literature on counterinsurgency, counter-guerrilla, counterterrorism, and the like. Since most of it was written by the losing side, it is of little value.'[69] Expanding on those views, a view has developed within the vibrant (relative to the UK's) United States military intellectual world that the theory is nothing more than 'a strategy of tactics'. A serving professor at the West Point US Military Academy, Gian Gentile, takes the view that population-centred counterinsurgency

[66] Kilcullen, *Out of the Mountains*, p160
[67] Kalyvas, Stathis, *The Logic of Violence in Civil War* (Cambridge, 2006)
[68] Hanson Baldwin, quoted in Bernard Fall, *Street Without Joy* (Stackpole Books, 1964), p372
[69] van Creveld, Martin, *The Changing Face of War: Combat from the Marne to Iraq* (Ballantine, 2008), p268

> ... has become the only operational tool in the Army's repertoire to deal with problems of insurgency and instability throughout the world ... It has reduced rather than promoted flexibility ... it is a method and no more, merely a set of tactics. To elevate it, as has been done, to a strategy is to confine the options of the armed forces whose role, in essence, is the application of extreme force ... It should not be viewed as strategy, or even policy for that matter.[70]

Another highly regarded American former soldier and academic, Andrew Bacevich, has compared the current enthusiasm for counterinsurgency and its relations with the disastrous financial constructs which brought the banking world to its knees. He argues that counterinsurgency

> ... is the military's equivalent of the financial sector's relationship with collateralized debt obligation, or CDOs. In the past few years, financial and military leaders have embraced complexity and believed that uncertainty and complexity if properly managed and monitored could be controlled. Both COIN and CDOs have proponents who believe in taking giant risks in endeavors because of their belief in the triumph of intelligence and motivation over chaos and uncertainty.[71]

It has been argued that the pantheon of COIN theorists is filled with losers and sometimes war criminals who would have won but for 'betrayal' or 'if only this had been different'.[72] The truth, Douglas Porch and others suggest, is that 'the wars were lost because the strategic context of the wars defied a tactical remedy. The results ranged from tactical disappointment to strategic catastrophe.'[73]

He suggests that there was and remains in counterinsurgency theory a lack of overall awareness as to how societies actually work. For example, he says, there is no entry for

[70] Gentile, Gian, 'A strategy of tactics: population centred COIN and the army', *Parameters*, XXXIX (Winter 2009), available at: http://www.carlisle.army.mil/USAWC/Parameters/Articles/09autumn/gentile.pdf
[71] Bacevich, Andrew, *New York Times*, 23 June 2010
[72] Porch, *Counterinsurgency*, p162
[73] ibid., p172

'women' or 'female' in FM 3-24.[74] Further ideas that 'consent' or 'legitimacy' plays a part in traditional counterinsurgency are misplaced.

It is also often argued that advocates of 'COIN' misunderstand the history whereof they write. All 'counterinsurgency' is hard-edged and exceedingly resource intensive. It is almost always accompanied by a significant degree of repression. This was amply in evidence in conflicts such as Malaya, and in many other British 'small wars'. The successful suppression by the US armed forces of the Philippines Insurgency in the early twentieth century – exactly contemporary with the British efforts in the Second Boer War and displaying many similar techniques, such as concentration camps – stands both as an object study in savagery and murder, and as an excellent early example of 'classical' techniques of COIN, according to the perspective of the historian Mark Moyer.[75]

It has been observed by Alex Marshall that in recent years, the only readily identifiable success against an effective guerilla war was in the savage and utterly ruthless campaign conducted by the Russians in Chechnya in the 1990s, long after the return of Chechens to their country following the death of Stalin.[76] The Russians set their strategic goal – the 'logic' of the campaign – as reintegration 'no matter what the human or material cost' and the removal of Chechnya as a threat to the stability of the North Caucasus.[77]

Another British commentator said of Russian 'counterinsurgency' activities in the nineteenth century 'let it be emphatically repeated that, while individually any man might have the right to condemn it, collectively, as nations, it is a case of glass houses all round'.[78]

In more recent years, the west has been fighting several conflicts it has characterised as 'insurgencies', in such places as Iraq and Afghanistan. In some ways, the source of much of the discourse (although not necessarily the material) of current thinking on counterinsurgency was written (initially as a PhD thesis at Oxford University) by John Nagl, who described British counterinsurgency practice in the Malayan insurgency. He saw the

[74] ibid., p 188
[75] Moyer, Mark, *A Question of Command* (Yale University Press, 2009) contains a laudatory study of US COIN efforts in the Philippines Insurgency of 1898–1902
[76] Marshall, Alex, 'Imperial nostalgia, the liberal lie and the perils of postmodern counterinsurgency', *Small Wars and Insurgencies*, 21:2 (June 2010), pp233–258
[77] ibid., p251
[78] John F. Baddeley, author of *The Russian Conquest of the Caucasus*, cited in ibid., p251

British Army as a 'learning institution' and compared it favourably to the US Army in Vietnam.[79] This drew on the ideas of Robert Thompson and, to a lesser extent, such practitioners as Frank Kitson. The early twenty-first century brought insurgency back into public discourse, in particular through David Kilcullen's various books.[80] All of these accepted that there was a coherent and workable doctrine and approach called 'counterinsurgency', based essentially around supporting 'legitimate government' and taking a 'population-centred' approach. In essence this was a descendant of the idea of 'hearts and minds', espoused (or so it was argued) in successful counterinsurgencies such as Malaya. Having said that, in a recent essay on insurgency and counterinsurgency in the *Routledge Handbook of Insurgency and Counterinsurgency*,[81] Kilcullen speaks of 'post-classical COIN'. In so doing he distances himself from 'classical' COIN – a position which, in fairness, he always took, although not so strongly. He makes the telling point that much of 'classical' COIN was developed to counter rural peasant insurrections in a post-colonial environment. In a fascinating discourse on the historiography of COIN, he argues that the term 'counterinsurgency' was invented only in the 1960s, and that its 'case-study basis draws on an extremely limited and perhaps unrepresentative sample of conflicts'.[82]

The conceptual problems inherent in answering the question 'what is a counterinsurgency?' are not lost on some more perceptive COIN theorists. They are addressed head on by David Kilcullen. Drawing on research by Ben Shepherd,[83] he concedes that there were Nazi officers who saw the importance of the 'need to protect, win over and cooperate with the local population' in counter-partisan operations in the occupied Soviet territories.

The debate over COIN and its evident problems in meeting expectations has become particularly vociferous, and indeed occasionally vitriolic when it concerns Afghanistan and

[79] Nagl, *Learning to Eat Soup with a Knife*

[80] Kilcullen, David, *Counterinsurgency* (Hurst, 2010); Kilcullen, *Accidental Guerilla*; Kilcullen, *Out of the Mountains*

[81] Kilcullen, David, 'The state of a controversial art', in Paul B. Rich and Isabelle Duyvesteyne, *The Routledge Handbook of Insurgency and Counterinsurgency* (Routledge, 2012), p128

[82] ibid., p146

[83] Shepherd, Ben, *War in the Wild East: the German army and Soviet partisans*, cited in David Kilcullen, 'Deiokes and the Taliban', in Mason, *Rule of Law in Afghanistan*, p42

Iraq.[84] Kilcullen has alleged that some critics take on 'strawmen of their own creation'.[85] For instance, Colonel Gian Gentile ends his book *Wrong Turn* with these words:

> American strategy has failed in Afghanistan (and Iraq) because it was founded on an illusion – that American style counterinsurgency could win Muslim hearts and minds at gunpoint and create viable nation-states on the Western model virtually from scratch in a short time. The idea that any of this ever made sense or has ever worked should be buried deep in the ground, yet the belief that counterinsurgency works persists like a vampire among the living.[86]

Colonel Gian Gentile places a lack of political strategy at the heart of the problem. In this he is echoed by Sir Sherard Cowper-Coles, former UK ambassador to Afghanistan, who quoted Edmund Burke at the time of the American War of Independence: 'The use of force alone is but temporary. It may subdue for a moment but it does not remove the necessity of subduing again; and a nation is not governed which is perpetually to be conquered … An armament is not a victory.'[87] Cowper-Coles goes on to echo Gentile (and an increasing number of other commentators) in pointing out that each insurgency is different and each is a political fight as much as a military one; and that what decides the outcome of insurgencies is not a series of prescriptions that can be derived from military studies of old conflicts, but the circumstances surrounding each one. As Douglas Porch puts it, 'each insurgency is a contingent event in which doctrine, operations and tactics must support a viable policy and strategy, not the other way around'.[88]

The ecology of insurgencies is far more complex than military doctrine will allow. Indeed ecology is not the only analogy from science that may be used. As the academic (and to a lesser extent practitioner) dialogue has developed over the past decade, some of the

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[84] For example, the comments to David Ucko's article in *Small Wars Journal*, November 2011, available at: http://smallwarsjournal.com/blog/counterinsurgency-doctrine-in-context

[85] Kilcullen, 'State of a controversial art', p146. Kilcullen also criticises some 'anti-COIN advocates for displaying personal animosity'

[86] Gentile, Gian, *Wrong Turn: America's deadly embrace of counterinsurgency* (New Press, 2013), p135

[87] Cowper-Coles, Sherard, 'Review article', *New Statesman*, 16 June 2013, available at: http://www.newstatesman.com/world-affairs/2013/06/investment-blood-frank-ledwidge-devastating-indictment-utter-unanswerable-foll

[88] Porch, *Counterinsurgency*, p337-338

language and analogies have become abstruse. Even some practitioners have begun to discuss insurgency in abstract fashion. General Stanley McChrystal and another researcher at Yale University, Kristina Talbert-Slagle, compared insurgency to disease and countermeasures to an immune response: 'In fact what we have to do is create in the nation state the equivalent of an immune system so that they have the ability to deal with the problem.'[89] According to this characterisation, complete as it is with a detailed outline of 'infectious agents waiting to get inside a warm nutrient laden environment', countries are termed 'infected' with insurgency. This insurgency may result from the failure of one or many inter-dependent systems. Perhaps this is going too far, not least in its value-laden characterisation of insurgency as something malignant. However, the insight here is that an insurgency is indeed attacking elements of an inter-dependent system.

To extend the analogy, one of the systems that may not be working in a society is its legal system. The case is made in this thesis that one aspect of countering insurgencies is that of law. The fact that this area has, until recently, been largely overlooked is itself testament to a failure of COIN doctrine to deal effectively with more difficult elements within any society. One reason for this may well be that military enthusiasts for COIN have, over the past decade, inevitably been foreigners in the lands within which they have worked and fought.

In a short essay on the intellectual foundations of contemporary COIN, Stathis Kalyvas asks what the political theoretical framework underlying contemporary COIN is, or at least that version of it revealed in the US Manual – an attitude echoed in large part by contemporary British theory. He points out that 'Policy guides, including field manuals, tend to be based on an intuitive rather than explicit or theoretical understanding of the issues with which they deal' and that the US FM 3-24 is no exception.[90] As he says, the implicit direction of the manual – and by extension, *faute de mieux*, of Western COIN – is given primarily for a specific type of situation:

[89] Lawfare, 'Lessons on counterinsurgency from the human body', Podcast No. 57, Stanley McChrystal and Kristina Talbert-Slagle, Brookings Institution (January 2014), available at http://www.lawfareblog.com/2014/01/lawfare-podcast-episode-57-general-stanley-mcchystal-and-kristina-talbert-slagle-on-lessons-on-counterinsurgency-from-the-human-body/

[90] Kalyvas, in Biddle, S., Kalyvas, S., Brown, W. and Olivant, D., 'Review symposium: The new US Marine Corps/ Army Counterinsurgency Field Manual as Political Science and Praxis', *Perspectives on Politics*, 6:2 (2008), pp351–353, available at http://www.apsanet.org/imgtest/POPJune08CounterInsurgency2.pdf?q=counterinsurgency-field-manual

> U.S. interventions in 'host nations' (its writers did not contemplate the possibility of a domestic insurgency). It is possible, therefore, to characterize it as a guide to 'benevolent occupation', benevolent in the sense that occupation is perceived as a temporary device until authority can be devolved to a (friendly) government.

The form of warfare dealt with by current COIN thinking might be categorised as nationalistic/idealistic conflicts of the kind fought in Vietnam and Iraq. These, Kalyvas says, are what the authors had at the back of their minds. Very little emphasis

> has been placed on other potential forms of warfare, such as those characterized by the fragmentation of rival actors, as well as the economization, criminalization and privatization of their motives and goals. Think Sierra Leone or the Congo, or for that matter Bosnia or, some might argue Kosovo. These are the kind of struggles described in Mary Kaldor's recent works.[91]

One might indeed argue that the war(s) in Afghanistan fall more into the last category – namely a 'new' form of war, as Kaldor might call it . Finally, as Kalyvas puts it:

> By adopting the *People's War* model, it misperceives the insurgent battlegrounds as places where the population interacts directly with either governments or insurgents (a problem, by the way, common to both the counterinsurgency and the revolutions literature of the 1960s). Sever the link with the insurgents, the thinking goes, and the population will have no choice but to turn to the government.[92]

The fallacy here is clear. Rarely is such a binary option available. Local and regional networks may be far more complex than a simple choice between 'government' (whatever that might mean in such places as Iraq in 2006–07 or Afghanistan today) and the 'insurgents'. This is very much the central thread running through Kalyvas's masterwork *The Logic of Violence in Civil War.*[93] Incidentally, it is worth mentioning that in this work Afghanistan is the only major insurgency over the last century that is *not* covered and commented on with penetrating analysis. Taking criticism of FM 3-24 a step further is Wendy Brown in the same

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[91] ibid.; it is likely that Kalyvas is referring to Kaldor, Mary, *New and Old Wars* (Stanford University Press, 2006) and Kaldor, Mary and Beebe, Shannon, *The Ultimate Weapon is No Weapon* (Public Affairs, 2010)

[92] ibid.

[93] Kalyvas, *Logic of Violence in Civil War*

series of reviews. She is bluntly dismissive of the whole document, accusing it of 'shoddy scholarly practices'.[94]

With the publication of the new FM 3-24, some of these criticisms may no longer be valid in their detail. For example, it can no longer realistically be claimed that it proposes 'people's war' as its paradigm. However, the new document does not differ in essence from the old one, in that it continues to view insurgency/counterinsurgency as a binary endeavour, rather than a flux of interests and motivations.

The rather binary notion of 'the government' against 'the insurgent', with the 'people' somewhere in between, is accepted by serious commentators even today (although it is expressed rather more elegantly). One such writer, Ganesh Sitaraman, whose work on the relationship between law and insurgency is generally rather more subtle, says this:

> But in the midst of insurgency the population has the opportunity to reject the illegitimate government and can easily take up arms against it. In legitimate governments, by contrast, the population supports the political authority's actions and complies with them out of obligation. Because insurgents and counterinsurgents seek to win the population's support, both attempt to bolster their legitimacy whilst diminishing the legitimacy of the other.[95]

This kind of approach, though tempting, ignores the kind of deep fieldwork carried out by researchers (such as Kalyvas), who argue that rarely, if ever, is such a binary approach appropriate.

Here we come to something of a conceptual elephant in the room. For underpinning much of current COIN thinking is the idea of the social contract, which might, at a stretch, be linked with the idea of 'legitimacy' touted in current COIN theory.

It could be said that insurgency might be described as an attempt to renegotiate the social contract by offering a better deal. This was expressed in its simplest form by the well-known US military commentator Bing West in August 2010:

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[94] Brown in Biddle, Kalyvas, Brown and Olivant, 'Review symposium: The new US Marine Corps/Army Counterinsurgency Field Manual as Political Science and Praxis'

[95] Sitaraman, Ganesh, *The Counterinsurgent's Constitution* (Oxford University Press, 2013), p16

> Counterinsurgency is based upon a social contract: Our soldiers bring money and honest government officials; in return, the people cease passively and actively supporting the insurgents.[96]

West was dismissive of this approach. There is, however, a far deeper problem than that rather simplistic objection – or indeed the problems outlined by Kalyvas, clearly expressed and compelling though they are. The problem is that in many places in the world, including much of Iraq and most of Afghanistan, to use the terms adopted by COIN theorists, legitimacy does not derive from the provision of social goods or an improved link with government. More accurately, it does not derive from more or better social goods from government, combined with diminished links with insurgents. To begin with, the problem is not always (or even often) the *how*, but is rather the *who* – who provides those social effects? Even in Western countries, the provision of excellent health and education made no impact whatsoever on the process of sophisticated insurgencies in such places as Ireland – or for that matter Spain or France.

A revolutionary war is 20 per cent military action and 80 per cent political, as the leading counterinsurgency strategist David Galula has put it.[97] Usually that 'political action' is framed within the context of the state. Within Western culture there is a deep presumption of state primacy – what Kalyvas calls 'grand politics'[98] – that often ignores the deep pragmatism inherent at the local level or in societies where state failure is the common experience.

Then there is the problem of perspective. David Ucko and Robert Egnell make the interesting observation that:

> Most accounts [of COIN] are written by military officers or academics with a specific interest in military history and perhaps for this reason they tend to deal predominantly or even exclusively with the role of the armed forces.[99]

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[96] West, Bing, 'Eleventh hour counterinsurgency', commentary in military.com, August 26 2010 (no longer available)
[97] Galula, David, *Counterinsurgency Warfare: Theory and practice* (Praeger, 2006, first published 1964)
[98] Kalyvas, *Logic of Violence in Civil War*, p10
[99] Ucko, David and Egnell, Robert, *Counterinsurgency in Crisis: Britain and the challenges of modern warfare* (Columbia University Press, 2013), p38

Anyone looking at the covers of many books in the large 'counterinsurgency' sections in military libraries might be forgiven for thinking that, contrary to Galula's prescriptions, countering insurgencies is the work of well-armed male soldiers in desert uniforms.

Exogenous COIN[100] – the problem of being foreign

The issue of *who* is providing the social goods that are designed to bring 'legitimacy' – chief among them 'justice and rule of law' – is surely important. Closely linked to the problem of the old saw 'my insurgent is your resistance fighter' is the reality that the wars being fought by the Western powers over the last decade have almost by definition been occupations.

When Kilcullen claims that 'our too willing and heavy handed interventions in the so-called war on terrorism to date have [created] tens of thousands of accidental guerrillas and tied us down in a costly series of interventions',[101] he is ignoring one key factor – indeed, it is argued here, *the* key factor. This is that the wars being fought have been and are interventions by foreign forces. The consequence is that the forces in those areas are essentially seen as occupiers.

The corollary of this uncomfortable reality is that there may well be factors involved in the insurgency that might not necessarily be described as 'accidental'. There may well be the very simple factor at play of resistance to invaders. If this key element is not addressed head on, it could have potentially fatal consequences for any notion of 'legitimacy'.

Kalyvas, in his critique of current military approaches referred to above, suggests that the current doctrine shies away from a fact that is clear to many observers – the real problem facing 'counterinsurgents' is their occupation:

> The manual does not appear to entertain the idea that some identities (say ethnic or religious ones) are maybe so hard-wired as to preclude reconstruction or reshaping and while it does recognize that in the age of nationalism there is little love or

[100] A term used, so far as I am aware, for the first time by Ashtri Surke. She uses the term 'exogenous' to apply to state-building. See Surke, 'Exogenous state-building'
[101] Kilcullen, *Accidental Guerrilla*, p264

> patience for foreign intervention or occupation, it brushes such considerations aside.[102]

In his highly acclaimed *Insurgent Archipelago*, Mackinlay expresses the same reservation:

> [FM 3-24] fails to engage with the idea that a counterinsurgent campaign conducted on someone else's territory is per se an invasion of that territory. It may be possible to put a legal gloss on its status but the reality on the ground is that the arrival of an overwhelming military force has the effect of an invasion.[103]

These considerations echo Robert Pape's aphorism concerning the source of suicide bombing: 'It's the occupation, stupid.'[104] Pape argues that suicide terrorism specifically is not the result of Islamic fervour, but rather it is used as a weapon against occupiers.[105] It may well be the case, then, that no amount of 'counterinsurgency' doctrine can succeed, as the problem is not one of how 'COIN' is done, but rather that 'COIN' is being done at all.

Huw Bennett agrees, claiming: 'There is scant empirical evidence to prove COIN measures are successful. The doctrine expects local people to accept foreigners imposing their modes of governance.'[106] This is particularly true of 'justice' and, as will be argued in Chapter 4 below, this is a very dangerous and unproductive approach.

Gil Meron's *How Democracies Lose Small Wars* examined France in Algeria, Israel in Lebanon and the US in Vietnam.[107] 'Democracies fail in small wars because they find it extremely difficult to escalate the level of violence and brutality to that which can secure victory; they are restricted by their domestic structure.'[108]

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[102] Kalyvas, in Biddle, Kalyvas, Brown and Olivant, 'Review symposium: The new US Marine Corps/Army Counterinsurgency Field Manual as Political Science and Praxis'
[103] Mackinlay, John, *The Insurgent Archipelago* (Hurst, 2009), p179
[104] Pape, Robert, 'It's the occupation, stupid', *Foreign Policy*, October 2010, available at http://www.foreignpolicy.com/articles/2010/10/18/it_s_the_occupation_stupid
[105] The idea is filled out in Pape, Robert and Feldman, James, *Cutting the Fuse* (Chicago, 2010)
[106] Bennett, Huw, 'Enmeshed in insurgency: Britain's protracted retreats from Iraq and Afghanistan', *Small Wars and Insurgencies*, 25:3 (2014), p505
[107] Meron, Gil, *How Democracies Lose Small Wars* (Columbia University Press, 2003)
[108] ibid., p15

A slightly more nuanced critique was offered by Douglas Porch, who argues that at its heart 'population-centred' counterinsurgency is simply another form of combat.[109] He is joined in this argument by Gentile, who has argued in several articles and a book that 'a strategy of tactics' is highly unlikely to produce success, and that the history of the last century has demonstrated this.[110] Seeing the situation otherwise is to indulge in a re-imagining of history. This in itself may not be damaging, were it not for the influence that these intensely Western-centric ideas have on actual operations. The arguments presented in such critical works are, of course, interesting in themselves. Their importance for the present purposes lies, however, more in the theme of ideas failing to address the reality experienced by those subjected to the 'strategy of tactics' that is 'counterinsurgency'. They draw out the absolute necessity of seeing 'insurgencies' as war, and as war experienced by a population that is neither inert nor automatically amenable to Western notions of democracy – or, more importantly for the present purposes, to the 'rule of law'.

David Ucko and Robert Egnell's *Counterinsurgency in Crisis* deals predominantly with the British experience, and does so within the framework and narrative of not 'doing' counterinsurgency properly, rather than attacking the premise itself.[111] However, in an article published in late 2013, Robert Egnell touched on a topic which is indeed central to this thesis, articulating the realisation that to the 'population', the counterinsurgent may well look rather more like an insurgent.[112] This realisation hints at the thought that perspective may be of key significance. From a survey of the critics of counterinsurgency doctrine and practice in general terms, we move now to look at how the literature has dealt with justice within the insurgency and counterinsurgency environment.

[109] Porch, *Counterinsurgency*

[110] Gentile, *Wrong Turn*

[111] Ucko and Egnell, *Counterinsurgency in Crisis*

[112] Egnell, Robert, 'A western insurgency in Afghanistan', *JFQ* (October 2013), p10, available at http://www.dtic.mil/doctrine/jfq/jfq-70.pdf

Insurgency, justice and military doctrine

Despite assertions that 'the primary objective of any COIN operation is to foster development of effective governance by a legitimate government',[113] all too often a narrow view of security is taken. Institution-building focuses heavily on security institutions. The importance of this with respect to the 'justice sector' is very great. Despite the overwhelming military focus, there is no lack of reference to 'rule of law'. The term is mentioned no fewer than 30 times in the 2006 edition of FM 3-24, which, as Thomas Nachbar says, 'suggests an attachment to the concept'.[114] The 2014 edition demonstrates an even closer attachment, with no fewer than 41 mentions.[115] There is an entire section of FM 3-24 (2006) dedicated to 'establishing the rule of law' (albeit only one page out of 360). It includes a somewhat ponderous definition of 'rule of law'.[116] The 2014 version also contains a section dedicated to 'establishing the rule of law'.[117] It contains pages that are very similar indeed to those found in its predecessor, but with some differences, including some more comprehensive advice on how to effect the establishment of the rule of law.

The importance of who is writing the doctrine is great. Despite the much advertised wide-ranging consultation before the publication of FM 3-24 (2006 edition),[118] there is no escaping the fact that this is a military document. It is highly questionable whether *dissenting* (as opposed to questioning or slightly critical) opinions or voices without links to the military-academic community were in fact included. The same applies to the equivalent British documents. As will be stressed in this thesis (and will already be obvious), there is far more to 'rule of law' than – as one commentator has put it – 'cops, courts and corrections'.[119] Mistaking the mechanisms of justice for the activity of justice is a very major error. Disputes over land, money or other resources are common everywhere, and where the 'state' does not provide any or any adequate dispute resolution procedures, societies will evolve their own.

[113] FM 3-24 (2006), 1-113
[114] Nachbar, Thomas, 'Counterinsurgency, legitimacy and the rule of law', *Parameters* (Spring 2012), p27
[115] FM 3-24 (2014)
[116] FM 3-24 (2006), Section D-38
[117] FM 3-24 (2014), paras 13-61 to 13-70
[118] See the foreword to FM 3-24, particularly pp14–17.
[119] Nachbar, 'Use of law in counterinsurgency'

The implication of this is that justice must be seen in a far wider context. As will be examined below, failure to address disputes at the local level (or indeed failure to set up mechanisms to do so) can have national implications. Likewise decisions at the national level – for example on changes in land tenure law – can have a serious impact on the legitimacy of government at the local level; and if it does not necessarily provoke insurgency, it can serve to exacerbate it.

There is a well-defined canon of works that are sometimes said to constitute 'informal doctrine' concerning insurgency and counterinsurgency, and some of these do deal to some extent with law within the insurgency context, although admittedly in rather cursory fashion. For example, General Sir Charles Gwynn, in the classic *Imperial Policing*, sets out the doctrinal basis of what has been called the 'British approach' to counterinsurgency: minimum force, unity of effort (of military and civilian authorities) and control, and the necessity of working within a well-understood legal basis, be that martial law or otherwise. Further, Gwynn is conscious of the military being 'a reserve of force in support of the civil administration'[120] and of the 'importance of seeing events from the other side'.[121]

The necessity of maintaining a constant awareness of the law and its potential is central to Sir Robert Thompson's *Defeating Communist Insurgency*.[122] Frank Kitson, another highly experienced practitioner, was well aware of the importance of law to the conduct of insurgency (as indeed explicitly was Thompson).[123] Kitson's insight was that a decision had to be made between using law as a weapon and seeing it as part of 'good governance', which is not by any means the same thing. A 'rule of law' approach does not necessarily sit well with a 'law as a weapon approach', and this challenge will be addressed in Chapter 2. There has been little else in 'informal doctrine' – books by practitioners – on justice within insurgency, aside from what has been discussed (or at least not until the last decade). Even David Galula passes over the need for judicial strategy – rather strangely, perhaps, given the

[120] Gwynn, *Imperial Policing*, p1
[121] ibid., p5
[122] Thompson, Sir Robert, *Defeating Communist Insurgency* (Hailer, 1966)

[123] Kitson, Frank, *Bunch of Five* (Faber and Faber, 1977); Kitson, Frank, *Low Intensity Operations* (Faber and Faber, 1971)

stress he places on narrative and/or propaganda, and indeed the success in Algeria of Jacques Verges, the lawyer who coined the term 'judicial strategy'.[124]

While there is awareness in current counterinsurgency theory of the 'shadow state',[125] the strong presumption is, as will be seen, that such a shadow state is the same (or at the very least has similar objectives as) a substantive, or what Kilcullen may call a 'legitimate', state. This is not necessarily the case, as many societies are run on a basis that neither requires nor is suited to 'state' structures. Nonetheless the idea persists that the 'state' model is to be promoted, and this is an idea that is deeply embedded in current 'formal' military and civilian doctrine and thinking.

These ideas of 'legitimacy' suffuse the US Army and Marine Corps' highly influential doctrinal documents (both versions of FM 3-24, from 2006 and 2014 and their rather less influential British counterpart *Countering Insurgency*. The heritage of British counterinsurgency doctrine, both 'formal' (military documents) and 'informal' (memoirs and works by individuals) was extensively described in Alex Alderson's PhD thesis (as yet unpublished), which provided a fine survey of doctrine taken against the background of British performance in Iraq.[126] Rarely is there any reference to justice and law and their importance to 'population-centred' counterinsurgency and legitimate government, although ideas of 'legitimacy' and 'rule of law' are regularly to be found. As has been seen when the literature is examined in more detail, ideas of the influence of courts and justice are regarded tangentially, with some rhetorical stress on 'bottom-up' approaches to civic governance. Suffice it for now to state that the importance of using courts as 'weapons of war' – an idea advocated here – is not appreciated in current doctrine.

Aside from military doctrine and comment on it, the literature concerning courts, justice and insurgency is disparate, though it certainly exists. To some extent, what follows in this thesis is a synthesis of literatures. These range from primary sources in the form of law reports contemporary to the historical period being considered through to legal theory in the form of jurisprudence. There is basic political theory and the history of political thought, and

[124] Galula, Counterinsurgency Warfare
[125] Kilcullen, *Counterinsurgency*, p202
[126] Alderson, 'Validity of British counterinsurgency doctrine'

historical sources both primary and secondary. There is the extensive literature on legal anthropology and the more defined work on legal pluralism, alongside (and often within) work done on reform of the 'justice sector' in conflict-affected states. However, none of the literatures deal separately with the matter at hand, namely the use of courts in insurgency, particularly as a tool or weapon in the pursuit of operational or strategic objectives.

Works concerning the law of war abound. No overview of the literature of law and war could fail to lead with a look at David Kennedy's short but powerful *Of War and Law.*[127] This book operates at the grand strategic level; but its ideas, which might be summarised by quoting one of its aphorisms 'Law as the landscape of war',[128] heavily influence the approach of this thesis. His ideas are centred on war being a 'legal institution'.[129]

There is some discussion of insurgency in *Of War and Law*, within the context of Iraq and the use of legal language in the condemnation of atrocities by US forces there:

> … the insurgents have a point of view which can also be expressed in the vocabulary of the modern law.[130]

There is no discussion of the potential of the use of law or courts as a weapon within the 'landscape' he describes, although in fairness it could be argued that the idea is implicit throughout the book. Interestingly for present purposes, Kennedy mentions the possibility of using the laws of armed conflict as a narrative tool and the effect this can have:

> Lawfare – managing law and war together – requires a strategic assessment of these various claims [of war crimes], and active strategy by military and humanitarian actors to frame the situation to their advantage.[131]

In saying this, Kennedy touches on – but then veers away from – the central argument of this thesis: that the landscape of war requires a judicial strategy by which to navigate.

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[127] Kennedy, *Of War and Law*

[128] ibid., p33
[129] ibid., p5
[130] ibid., p134
[131] Ibid., p125

As Kennedy points out, the study of law and war – and the interaction between the two – has been at the centre of discussion about the 'war on terror',[132] within which the Iraq and Afghan wars rightly dominate the literature.[133] These books tend to deal with the *ius ad bellum* and indeed the *ius in bello* aspects of the conflicts. However, works looking at the interaction of the law and courts with the operational level in any given conflict are rather rarer. With respect to the war in Afghanistan, a key work is Whit Mason's *Lost in Inaction*, which contains a fine collection of essays.[134] A similar work, with a wider geographical focus but a similar thematic approach, was edited by Deborah Isser: *Customary Justice and the Rule of Law in War-Torn Societies* covers the interface between rule of law development and rule of law reality in several conflict-affected zones.[135] There are particularly interesting contributions concerning Iraq and Sudan. As a study of customary law in conflict, it is excellent, although it perhaps suffers from the faults of any edited volume of contributions, in that issues generic to all conflicts are dealt with several times over. Ganesh Sitaraman's highly original *Counterinsurgent's Constitution* provides another set of suggestions as to how to deal with restructuring a legal system in the context of an insurgency.[136] The theme is similar to this thesis. *Counterinsurgent's Constitution* is understandably very Afghan focused, and this has produced a somewhat excessive stress on the nostrums applied to that country in recent years. However, despite the significance of the Taliban's justice system (which will be examined in Chapter 3), there is no mention at all of 'competitive' judicial systems.[137] Nonetheless, the idea of counterinsurgency as, essentially, a struggle between the incumbent (as Kalyvas would call the counterinsurgent government) and the insurgent for the 'support, or at least the acquiescence of the population' reflects a highly conservative approach to insurgency.[138]

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[132] ibid., pp1–2 and passim

[133] For example McGoldrick, Dominic, *9/11 to the Iraq War 2003: International law in an age of complexity* (Hart, 2004); Shiner, Phil and Williams, Andrew, *The Iraq War and International Law* (Hart, 2008)

[134] Mason, *Rule of Law in Afghanistan*

[135] Isser, Deborah (ed.), *Customary Justice and the Rule of Law in War Torn Societies* (United States Institute for Peace, 2011)

[136] Sitaraman, *Counterinsurgents' Constitution*. It seems to be based on his previous article 'Counterinsurgency and constitutional design', *Harvard Law Review*, 121:6 (2008)

[137] Save for one oblique mention (with, in fairness, some extensive footnoting which includes reference to the Taliban's internal code of conduct, if not their courts) and a reference to Hezbollah civil administration

[138] Sitaraman, *Counterinsurgent's Constitution*, p36. The idea pervades his book

It might therefore be argued that Sitaraman makes the mistake of treating the 'people' as an object, rather than a dynamic agent. It is surprising in such a work that Kalyvas is not discussed, and indeed does not seem to be referenced. Nonetheless, Sitaraman's idea of 'Organic Rule of Law'[139] is nuanced, and his discussion of 'Indirect Rule' (which will be looked at in Chapter 4) is useful and penetrating, as is his final prescription for an eponymous 'counterinsurgent's constitution', which in its wide-ranging nature might echo the idea within this thesis of a judicial strategy.

Literature on insurgent courts

Work on insurgent use of courts is rare, and it is to that literature that this thesis partly aspires to add. An early example is Jon Lee Anderson's popular *Guerrillas*, which contained an entire chapter on the ways in which insurgents regulate themselves and others.[140] It is this book, more than any other, that provided the seed for this thesis, thanks to the idea that, in setting up their administrations and particularly their courts, insurgents are engaged in a 'revolutionary rehearsal' of the rule they aspire to wield.[141] As a popular work on travel in war zones, it does not aspire to be a study of the nature of the use of law in insurgency. However, it is fair to say that there is enough in it to give pause to any counterinsurgent.

Works focusing on the role of courts in particular conflicts are rare. One such conflict was the United States Civil War, and the role of the law in that conflict is covered in some detail by *Justice in Blue and Gray*, which was concerned precisely with how the courts and the law in both the Confederacy and the Union impacted the strategy, and to some extent the conduct, of the US Civil War – in other words, how law was used as a weapon, precisely the topic of this thesis.[142] A similar approach was adopted to another conflict – that between Irish Nationalists and the British state in the Irish War of Independence – by David Foxton in *Sinn Fein and Crown Courts*,[143] which covered in some detail the deliberate strategy adopted by the Irish Nationalists of using both their own courts and the British courts to undermine British legitimacy. This focus on the use of the law as a strategic tool was placed in an Irish

[139] ibid., pp183ff
[140] Anderson, Jon Lee, *Guerrillas* (Abacus, 1992)

[141] ibid., p172
[142] Neff, Stephen C., *Justice in Blue and Gray* (Harvard, 2010)
[143] Foxton, David, *Sinn Fein and Crown Courts* (Four Courts Press, 2008)

historical context by Heather Laird in *Subversive Law in Ireland 1879–1920*;[144] it also considered the wider context of subaltern studies in places such as India. The doyen of scholars of British counterinsurgency in the nineteenth and early twentieth centuries, and specifically of the Irish War of Independence and the early days of the Irish Republican Army, is Charles Townsend. His most recent work, *The Republic*, deals extensively with the importance of courts to the overall strategy of the Irish struggle for independence.[145] The Sinn Fein courts themselves and their work (looked at in Chapter 3), has been examined in some detail already.[146]

The interplay between the law and British counterinsurgency in the so-called 'classic period' of counterinsurgent wars during the 1950s was intensively dealt with by David French in 2012.[147] He covered in detail the legislative strategy taken by the British during that period. This ground-breaking book made abundantly clear – if not explicitly, then certainly implicitly – the importance of a sensible judicial strategy in general and during the period in question. In its later pages, French even introduces the contemporary term 'lawfare' – although he confines the definition to its use in the international context.[148]

Afghanistan is an exception to the lack of discussion on justice. The sheer investment made in the country in the justice sector has produced a vast amount of official reports and assessments. Most are concerned with the planning or results of 'formal' justice projects, which is to say the construction of courts and the funding of training for judges and prosecutors.

As for the link between insurgent courts, the justice sector and justice, the two articles I wrote on my return from Afghanistan (mentioned above) were probably the first.[149] With hindsight, they are rather rudimentary, based as they were on far less data than similar literature is today. From the early days of the campaign, however, several scholars were working on Taliban justice and its importance to their strategy. Foremost among those was

[144] Laird, Heather, *Subversive Law in Ireland 1879–1920* (Four Courts Press, 2005)
[145] Townsend, Charles, *The Republic* (Allen Lane, 2013)

[146] Kotsonouris, Mary, *The Dail Courts 1920–24* (Irish Academic Press, 1994)
[147] French, David, *The British Way in Counterinsurgency 1945–1967* (Oxford, 2012)

[148] ibid., pp229–232, 253–254
[149] Ledwidge, 'Justice in Helmand'; Ledwidge, 'Justice and counter-insurgency in Afghanistan'

Antonio Giustozzi. His several books and edited volumes contain interesting detail about the Taliban's justice system.[150] However, his work on justice was distilled in the form of a more recent report, *Shadow Justice: How the Taliban run their judiciary?*, which deals in detail with the procedure, personnel and strategy of the Taliban judicial system.[151] At the granular level of a single province, the key role played by justice in Afghanistan (and by extension all similar conflicts) was clearly outlined in Michael Martin's PhD thesis and subsequent book *An Intimate War*.[152] This was a step forward from the perspective of justice and insurgency, as it evidenced how much of a priority the provision of justice was for the majority of Helmandis at a time of insurgency and/or civil war.[153]

It is at this more granular level that the current literature begins (but only begins) to take into account a very rich seam of scholarship in two highly apposite fields: legal anthropology (and particularly the area within it of legal pluralism) and 'rule of law development'. Both fields of study have long heritages that, it is argued here, are highly relevant to the dilemmas facing those who find themselves involved in combating (or indeed fomenting) insurgency. However, it is surprising that almost none of the military doctrine, either 'formal' or 'informal', of the last five decades has made more than a passing reference to the extensive and indeed connected work done in those two fields.

A very notable exception to the lack of discussion of insurgent courts has been the work of Sandesh Sivakumaran. His authoritative *Law of Non-International Armed Conflict*[154] contains a section that digests the work he did on insurgent courts for a 2009 article for the *Journal of International Criminal Justice*.[155] He takes a very pragmatic view of such courts, believing that:

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[150] See Giustozzi, *Koran, Kalashnikov and laptop: The neo-Taliban insurgency in Afghanistan 2003–2007* (Hurst, 2007); Giustozzi, Antonio, *Decoding the New Taliban: Insights from the Afghan field* (Hurst, 2009)

[151] Giustozzi, Antonio, Baczko, Adam and Franco, Claudio, 'Shadow justice: How the Taliban run their judiciary' (Integrity Watch, 2012), available at http://www.iwaweb.org/_docs/reports/research/shadow_justice-how_the_taliban_run_their_judiciary.pdf

[152] Martin, Michael, *An Intimate War* (Hurst, 2014)

[153] ibid., p33ff

[154] Sivakumaran, Sandesh, *The Law of Non-International Armed Conflict* (Oxford University Press, 2012)

[155] Sivakumaran, Sandesh, 'Courts of armed opposition groups: fair trials or summary justice', *Journal of International Criminal Justice*, 7 (2009), pp489–513

> Rather than ignoring them [courts] or criticizing them without offering concrete suggestions for improvement, the international community needs to grapple with them and consider how best they may be utilized in order to aid enforcement of the law.[156]

Jonathan Somers takes the view that international humanitarian law, the law of armed conflict, should act as if it meant what it said about 'equality of belligerents' and allow the possibility of insurgent courts to have certain judgments recognised.[157] In this he is supported by Parth Gejji.[158] The arguments on these issues will be revisited in more detail in Chapter 3.

It might be contended that many of the arguments concerning the nature of insurgency, its social role and causes sit at least partly within the discipline of anthropology. We turn first to the chronologically (and indeed conceptually) earlier area of legal anthropology. Its very history is infused with the dilemmas faced by colonial administrators struggling with the problems presented by attempts to impose a set of legal structures on societies that already have deeply entrenched systems. In essence, this is an early version of the idea of the 'shadow state', a term which carries within itself some embedded assumptions (chiefly that of the 'state', and indeed the assumption that such a state is 'shadow'). There was much discussion in the late nineteenth and early twentieth centuries of what would now be termed 'legal pluralism' (see Chapter 4 for a more complete discussion), the existence on the same territory of two or more legal jurisdictions. In India, and particularly the North West Frontier provinces bordering Afghanistan, the debate concerning how to exercise judicial power went on for decades. This was also true in other areas, including West Africa, where Lord Lugard crystallised the British approach (and indeed the approach more generally in the British Empire) in *The Dual Mandate in British Tropical West Africa*, which discussed in detail the concept of 'indirect rule'.[159] Indirect rule meant, essentially, the

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[156] Sivakumaran, *Law of Non-International Armed Conflict*, p562

[157] Somers, Jonathan, 'Jungle justice: Passing sentence on the equality of belligerents in non-international armed conflict', *International Review of the Red Cross*, 89:867 (September 2007), available at http://www.icrc.org/eng/assets/files/other/irrc-867-somer.pdf

[158] Gejji, Parth S., 'Can insurgent courts be legitimate within international humanitarian law?', *Texas Law Review*, 91 (2012–13), p1525, available at http://www.texaslrev.com/wp-content/uploads/Gejji.pdf

[159] Lugard, Frederick, *The Dual Mandate in British Tropical West Africa* (Forgotten Books, 2012)

acceptance of local laws and customs, and the countenancing of them (within reason). This policy ensured minimum conflict between 'formal' government and the peoples notionally subject to it. The explicit link between war and social anthropology was reflected in the collection of key (indeed sometimes classic) anthropological articles in the 1967 *Law and Warfare* by Paul Bohannan.[160] At a more generic level is *Can Intervention Work?*, by Rory Stewart and Gerald Knaus. [161] The significance of this empirically derived work is that it understands that principles and practices which seem self-evident to those intervening are in no way as obvious to those into whose countries interventions are directed.

Here we have introduced the concepts essential to the remainder of the thesis and have reviewed the literature that has hitherto addressed the central ideas. The next chapter looks at how law and insurgency combine in practice.

[160] Bohannan, Paul *Law and Warfare: Studies in the anthropology of conflict* (Natural History Press, 1967)

[161] Stewart, Rory and Knaus, Gerald, *Can intervention work?* (Norton Global Ethics Series, 2011)

CHAPTER 1

THE LAW AND INSURGENCY

This chapter provides an introduction to the legal environment within which insurgency takes place. It is divided into five short sections dealing with the legal background to insurgency, the social and political background, legitimacy, lawfare and narrative.

In a 2009 essay for the *Virginia Law Review*, Ganesh Sitaraman, whose work was briefly discussed in the literature review above, rightly observes that 'Despite counterinsurgency's ubiquity in military and policy circles, legal scholars have almost completely ignored it.'[162] The same is true in reverse, in that counterinsurgency scholars and practitioners have largely ignored the legal aspects of their topic.

Section 1 takes a legal approach to insurgency, with the objective of casting some light on how the law sees that form of war and assesses the status of those who conduct it. It aims to highlight the importance of understanding the fact that the law can have a critical impact on outcome. Section 2 looks at the areas where legal, political and social theory impinges on insurgency; it looks at such matters as legitimate monopoly of force and rule of law. Section 3 engages briefly with ideas of legitimacy that wind through current counterinsurgency doctrine. Section 4 is an introduction to lawfare, the confluence of law and war. Section 5 asks how the law might be used as an instrument of narrative.

Section 1

A legal approach to insurgency

Rebellions and insurgencies have been subject to some form of international legal control – or at the very least definition – for centuries. Initially this was for the rather simple and undeniable fact that insurgencies, particularly effective ones, could have an impact on third

[162] Sitaraman, Ganesh, 'Counterinsurgency, the war on terror, and the laws of war', p1747

parties, namely other states.[163] There is always the risk of intervention by those third states, often ostensibly to protect their own interests.[164]

In more recent years, states have begun to see themselves as having some degree of responsibility. This is exemplified most clearly by the idea of 'humanitarian intervention' seen recently in Bosnia in 1995, Kosovo in 1999 and Libya in 2011. It is not necessarily a recent innovation. For example, Britain intervened as far back as the Greek War of Independence in 1824 ostensibly to prevent massacres of Christians; similarly, the French in Syria in 1860 and the Russians in Bulgaria in 1877. At this time there was much rhetoric in the UK concerning Ottoman actions in the Balkans. Finally, universally accepted international law (in the shape of the Geneva Conventions) now protects those involved as both combatants and non-combatants in 'cases of armed conflict not of an international character'.[165] What, though, does international law have to say about the definition of 'insurgency'? And is such a definition important, particularly in the context of insurgent courts?

Historically there have been three types of what are now called 'internal armed conflict': rebellion, insurgency and 'belligerence'. The principal distinction between the three has related to the intensity of the violence.[166] Traditionally, rebellion was treated as an internal matter. It is 'a modest, sporadic challenge by a section of the population intent on gaining control'.[167] Provided the rebellion was put down in good time, international law considered it to be a matter to be dealt with under the criminal laws of the state involved.

An insurgency was a rather more serious matter, involving 'serious violence coupled with the inability of the government to suppress the violence'.[168] 'Insurgency, as far as foreign states are concerned, results from the determination not to recognise the rebellious party

[163] Moir, Lindsay, *The Law of Internal Armed Conflict* (Cambridge University Press, 2007), pp2–3

[164] As most recently in the case of Iran assisting anti-Western insurgents in Iraq from 2003–2011. The civil war in Syria currently involves all of its neighbours either indirectly as recipients of refugees (Jordan and Turkey), directly as covert supporters of one side or another (Russia, Qatar and Saudi Arabia) or directly as combatants (Israel, even if only occasionally). There was regular intervention in civil wars and insurgencies by both the United States and the Soviet Union during the Cold War

[165] Article 3 of the Geneva Conventions 1949, Common to all Four Conventions. This is known as 'Common Article 3'

[166] Sivakumaran, *Law of Non-International Armed Conflict*, p9

[167] Moir, *Law of Internal Armed Conflict*, p4

[168] Sivakumaran, *Law of Non-International Armed Conflict*, p10

as a belligerent on the grounds that there are absent one or more of the requirements of belligerency.'[169]

There were no formal advantages accruing to a group which had been recognised as 'insurgents'. Recognition 'regulated the relationship between the insurgents and the recognising state'.[170] The recognition of insurgency by an outside state, therefore, was not the result of the satisfaction of certain defined conditions, but rather the realistic acceptance of the situation on the ground, in order to ensure national interests.

However, recognition as 'belligerents' was of even more importance. The status of belligerency was set out initially by the eighteenth-century Swiss jurist Emerich de Vattel in his book *The Law of Nations*. There was a rather more clearly defined set of criteria to be fulfilled. Traditionally these were: first, that a civil war existed – the most important criterion, as this distinguished the situation from simple acts of criminal violence; second, that the insurgent group occupied and conducted a measure of 'orderly administration' in that area; third, that insurgents should abide by the laws and customs of the law of war;[171] fourth – and rather more controversial – was that there was a practical necessity for states to define their attitude to the civil war. If those criteria were fulfilled and insurgents/rebels were recognised as belligerents, there could be considerable advantages, including trade, regulation of the conflict and the law of war, from the perspective of the recognising state, with implications for combat immunity and prisoner of war status, for example.[172] The recognition of belligerency was as much a decision based on the facts on the ground as it was a political decision, although clearly such recognition had political potential. In the fight for legitimacy, recognition of belligerency was if not vital, then certainly very important; it was, in a sense, the first step to the ultimate objective for many insurgents – recognition as a state, about which a vast jurisprudence exists.

As Stephen Neff says in his legal history of the United States Civil War, one of the greatest of all 'insurgencies' in history, *Justice in Blue and Gray*, 'specific issues beyond number hinged on this most basic question' of what the precise legal nature of a given conflict is, and

[169] Lauterpacht, H., *Recognition in International Law* (Cambridge University Press, 1947), p270
[170] Sivakumaran, *Law of Non-International Armed Conflict*, p14
[171] ibid., p11
[172] ibid., p17

specifically whether the parties, one or both, are to be seen as 'belligerents'.[173] One key factor in making that decision might be framed around the question 'are these rebels merely disgruntled individuals or must they be treated as other soldiers might?' Clearly this is largely a question of perspective, and in some ways is a reframing of the terrorist/freedom fighter question. The matter was succinctly framed by the US Supreme Court in one of the cases brought at the time, concerning the status of Confederate Navy ships:

> When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest as a war.[174]

Surely this is, to some extent, a matter of observation and common sense, as the court implicitly recognises. As it implies, belligerent status is a different quality from the status of independence. This dilemma can go to the heart of policies of countries far from the locus of the insurgency itself. In the US Civil War, for example, the awarding of 'belligerent' status to the Confederate States of America (and the consequences flowing from that) was driven to a great degree by the requirements of the cotton business in the north-west of England. It was in the interests of those managing that trade that such trade should be legal. In turn, the way in which the United States treated British vessels acting in accordance with that decision to treat the Confederate States of America as 'belligerent' (i.e. having status sufficient to trade with) deeply impacted US–UK relations.

While the terminology may have shifted, many of the same questions are, then, clearly alive today. Are insurgents to be treated any differently from criminals, or do they have another status? That is only one of several questions, the answers to which depend on the status, de facto, of the insurgency. The huge legal controversies concerning how Taliban fighters are treated by US forces are only one facet of this field of legal controversy.

The provisions outlined above are somewhat antiquated, in that the term 'belligerent' is no longer used in common discourse of international law. However, international law does not

[173] Neff, *Justice in Blue and Gray*, p15
[174] Prize Cases 67 US635 (1863) at 666-667. The issue here was the date of the commencement of the war

operate like municipal law, where laws can be abrogated or repealed. There is no doubt that, even with the advent of provisions such as the Additional Protocols to the Geneva Conventions,[175] the ideas running through these concepts of, for example, 'belligerent' still exist. While there have been no incidents of explicit recognition specifically of insurgency or belligerency since 1949, for example, there can be little doubt that the recognition by several states of the National Transitional Council (NTC) of Libya in 2011 was implicit:

> In line with our assessment of the NTC as the legitimate interlocutor in Libya representing the aspirations of the Libyan people, the Government has invited the NTC to establish an office in the UK. This will enhance our existing relationship with the NTC ... It will help us to work more closely together on sharing information and formulating our policy towards Libya. This arrangement does not affect our position on the legal status of the NTC: the British Government will continue to recognise States, not Governments.[176]

It is important to note the caveats in this statement: it stops short of recognising the NTC as the government of Libya, at least at that point. A similar statement was made concerning the Syrian National Council.[177] While the terms 'insurgency' and 'belligerency' are not used, in both these cases the UK clearly went beyond treating the Libyan and Syrian insurgents as mere rebels.[178] On 6 March 2013, the Syrian National Council was granted Syria's seat at the Arab League,[179] indicating extensive recognition that was analogous to 'belligerency'. It is well worth mentioning here that the question of state recognition, as hinted at by William Hague in his statement above, is a discrete and complex topic in itself.

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[175] The First Protocol regulates the treatment of victims of international armed conflicts; the Second regulates victims of non-international armed conflicts. Both were promulgated in 1977, and were the result of extensive negotiation

[176] UK Government, 'Press release: Written Statement of UK Foreign Secretary concerning Libya', 13 May 2011, available at https://www.gov.uk/government/news/supporting-the-libyan-national-transitional-council

[177] UK Government, 'Press release: Foreign Secretary William Hague said that it is important for opposition groups to be able to put aside their own differences and come to a united view of the way forward for Syria', 21 November 2011, available at https://www.gov.uk/government/news/foreign-secretary-meets-syrian-opposition

[178] As well as France, which also recognised the SNC: see, for example, Statement of Laurent Fabius, 13 November 2013, available at http://www.diplomatie.gouv.fr/en/country-files/syria-295/events-5888/article/statement-issued-by-mr-laurent The Friends of Syria, composed of a wide variety of states, asserted their support for the SNC in April 2012

[179] BBC, 'Opposition takes Syria's seat at Arab League summit', BBC Online, 26 March 2013, available at http://www.bbc.co.uk/news/world-middle-east-21936731

These questions continue. The controversy surrounding the 'Islamic State' which burgeoned in mid-2014 illustrates the problems concerning recognition and the relationship it has with insurgency. For example, the difficulties that may arise might be illustrated by a speech given by British Prime Minster David Cameron in August 2014. Cameron said that it was 'abhorrent' that British citizens had 'declared their allegiance' to groups such as the Islamic State. The consequence could be, the strong inference was, that at least those with dual nationality would have their passports removed.[180] These are dangerous waters, as the question might be raised whether 'allegiance' to such groups as Islamic State was of a different order and magnitude from allegiance to criminal groups such as, for example, the Mafia. If so, is there an implicit recognition that Islamic State has some attributes of a state, or at the very least of 'belligerents'?

These issues notwithstanding, the treatment in classical international law might be regarded as rather more helpful in developing a workable definition of 'insurgency' than more recent military doctrine. It is telling that neither US nor UK military doctrine refers even in passing to the extensive and deep academic and political discourse on the legal nature and effect of insurgency.

What are the consequences of this form of largely historical recognition (be it ever so rarely addressed today) for the present topic? Practically, it must be conceded, little. However, the extensive analysis carried out, particularly in the nineteenth century, remains useful, if only to demonstrate that there is little new in the discourse of insurgency itself, even if 'counterinsurgency' has become rather more complex. Clearly the establishment of a civil/administrative regime that is adequate to provide support to a working system of criminal or civil dispute resolution is telling. As this thesis will demonstrate, it may also be vital, if not decisive, to the success of an insurgency.

The status of insurgents and international law

There has been a great deal of controversy over the past decade as to what distinguishes an insurgent combatant from a criminal – or indeed, as the United States terms them, 'unlawful enemy combatants'. The current law relating to status is based on the Additional

[180] BBC, 'David Cameron outlines new terror measures to MPs', BBC Online, 1 September 2014, available at http://www.bbc.co.uk/news/uk-29008316

Protocols to the Geneva Conventions (1977), and particularly article 44 of the first Additional Protocol, which governs the status of combatants. The Additional Protocols themselves are not free of controversy,[181] but it is generally accepted that they are unlikely to be changed or supplemented.

The law surrounding these issues and the status of insurgents has become abstruse and a specialist field in itself, particularly in the United States.[182] The details of that debate are of little or no relevance here, though it might be noted that the efforts by the West to establish some form of moral ascendancy have been vitiated by credible accusations of torture, rendition, failure to accord due process and overall hypocrisy. None of this has assisted in achieving notional objectives of establishing democratic values. It may well be that this also impacted on the degree to which the West's activities in places such as Afghanistan and Iraq have been regarded as legitimate. What is relevant is that current international law accepts insurgents as combatants so long as certain conditions are fulfilled, mainly the carriage of weapons openly at all material times.[183] It is also of relevance that article 1(4) of the First Additional Protocol states that all the Geneva Conventions apply to non-international armed conflict, as well as to conflict between states – including 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'.[184]

As we saw above in connection with the policy of David Cameron's government to 'returning' Islamic State fighters, the controversies concerning the Islamic State (which at the time of writing are still very much ongoing) demonstrate that these matters have very deep potential practical import, and care must be taken in terms of how domestic counter-terrorism law concerning 'allegiance' impacts on effective, if illegitimate, insurgencies elsewhere.

The specific and connected question of the status of insurgent courts in international law is addressed in Chapter 3.

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[181] Greenwood, Christopher, 'A Critique of the Protocols to the Geneva Conventions of 1949' in *Essays on War in International Law* (Cameron May, 2006), p179

[182] See for example the stream of cases in the United States Federal and Supreme Courts; case of *Hamdan* v *Rumsfeld* (US SC available at http://www.supremecourt.gov/opinions/05pdf/05-184.pdf)

[183] First Additional Protocol to the Geneva Conventions of 1949, article 44.3

[184] ibid., article 1.4

Counterinsurgent judicial strategy, occupation and the law

To some extent the parameters of counterinsurgent judicial engagement, at least in the context of occupation, are defined by law in the shape of the Hague Regulations of 1907[185] and the fourth Geneva Convention.[186] These set out the duties of 'belligerent occupiers'. Article 43 of the Hague Regulations states:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as is possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Clearly, to some extent, this gives very wide latitude indeed to an occupier, while at the same time creating some very definite obligations, the most onerous of which, as the British and American occupiers of Iraq discovered, is the 'restoration of law and order'.[187] Nevertheless, as Christopher Greenwood points out, 'the fact that the principles we have considered are difficult to apply does not remove their validity'.[188]

However, concerning judicial authority, the latitude available to an occupier is reduced somewhat by article 54 of the Fourth Geneva Convention:

> The occupying power may not alter the status of public officials or judges in the occupied territories or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.

This must be read alongside article 64 of the same Convention, which states that 'the penal laws of the occupied territory shall remain in force' subject to provisions that may be essential to fulfilling the occupying power's obligations to 'maintain orderly government' and ensure the security of the occupiers. The strong implication here is that an occupying

[185] Regulations annexed to Hague Convention number IV respecting the laws and customs of war on land (1907) (the Hague Regulations)
[186] Geneva Convention IV relative to the protection of civilian persons in time of war
[187] For further details, see, for example, Greenwood, Christopher, 'The administration of occupied territory in international law', in *Essays on War in International Law,* p353
[188] ibid., p373

power can set up its own courts, if that is deemed necessary.[189] 'In general the courts of an occupier will have no part to play', save that actions of the occupying forces may be subject to judicial review by their own courts.[190]

It may be argued that the thrust of these provisions is pragmatic, and the assumption within them is that the administration of the occupied territory is temporary. Within the context of the present work, these provisions are relevant, not so much for their application in situations of occupation, but for their importance (or potential importance) in operational planning – either to prevent insurgency or to counter it. This matter is looked at in Chapter 2.

Section 2

Law, society and insurgency

The importance of law to societies

The anthropologist Sally Falk Moore has said that 'there is an intimate relation between law and society, that law is part of social life in general and must be treated analytically as such'.[191] Surely no activity, certainly in the field of conflict and warfare, is more bound up with society than counterinsurgency. It is surely incumbent, therefore, on counterinsurgents to understand fully the parameters of the societies in which they work, and specifically, for present purposes, those relating to law and dispute resolution.

This thesis is concerned with the way courts have been used by insurgents and counterinsurgents, particularly in the decade after 2001.[192] All societies at whatever level of sophistication develop or evolve methods of resolving disputes. The traditional framing of the 'separation of powers' includes the judiciary as one of the key elements of government.

[189] ibid., p376
[190] ibid.
[191] Falk Moore, Sally, *Law as Process: An anthropological approach* (Routledge and Kegan Paul, 1978), p218 (quoted in Isser, *Customary Justice*, p4)
[192] There is a definitional distinction between the idea of law in the abstract and the processes and procedures of dispute resolution. In this thesis, the term 'court' will refer to the fora at which disputes can be settled

The degree of complexity by which those systems – whether framed as 'judiciary' or with a cognate role – resolve disputes increases according to the complexity of the society using them. Within small, tribe-based societies in which all members know each other, dispute resolution is carried out within extended families. For the small groups that constitute hunter-gatherers, the motivation behind resolving disputes often lies in the group retaining its cohesion as a self-supporting unit, which becomes ever more fragile as it loses members. In other words, it cannot afford to lose people through ostracism, death or injury as a result of conflict. Survival is marginal.[193] As anthropologist Jared Diamond points out in *The World until Yesterday*, disputes in such societies often occur between members of families, and negotiations may involve all members of the extended family affected.[194] This is a situation where all members of the community are known to each other.

As societies develop, so necessarily does the sophistication of the mechanisms used:

> … there is a virtual continuum, from small societies with no centralised authority or justice system, through chiefdoms in which the chief resolves many disputes onto weak states in which individuals often still take justice into their own hands and concluding with strong states exercising effective authority.[195]

Settler agrarian societies develop interests in land, and the implications for the complexity of disputes are great. The relationship between land and its ownership, access, inheritance, exchange, valuation, sale and use all generate the necessity for rule-based dispute resolution.[196] A similar issue is the level of complexity for pastoralists – with the need to resolve disputes involving the movement of groups of animals and people on a seasonal or annual basis across land that may be owned. Conflict can also arise from disputes concerning ownership of the flocks. These matters generate a whole echelon of requirements for rule-based (perhaps another and better phrase might be 'norm based') dispute resolution systems.

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[193] Roberts, Simon, *Order and Dispute* (Quid pro Quo Books, 2013), pp57ff
[194] Diamond, Jared, *The World until Yesterday* (Allen Lane, 2012)
[195] ibid., p92
[196] Roberts, *Order and Dispute*, pp73ff

The nature of these dispute resolution systems is immensely varied, ranging from 'umpire-based' mechanisms (such as ad hoc tribunals) through mediation by respected elders or kin, to tribal or clan gatherings. The anthropologist Bronislav Malinowski conducted a landmark study of society on the Trobriand Islands in the early twentieth century. He found that in any society, the preservation of the rights of others and the curbing of human inclinations, passions or instinctive drives may not necessarily be achieved through 'courts and constables'.[197] Malinowski was a pioneer in the field of the academic discipline 'Anthropology of Law', and some of the findings in that field will be referred to throughout this thesis.

For present purposes, at the very least in non-state systems it is probably right to say that the resolution of disputes is based on escalating violence, or at least coercion – as seen above, some societies eschew violence as counterproductive to the survival of the tribe or group. Sometimes the form of coercion may better be described as 'custom', 'manners' or something akin to what, in our own culture, might be described as 'the done thing'. This is usually within a system of essential consensus concerning the application of that violence, custom or coercion – a system, as it were, of regulation. This is especially the case concerning more 'developed' societies, such as those that will be dealt with in this thesis.

Such systems can extend as far as blood feuds, which – far from being a symptom of the kind of chaos described by Hobbes as 'warre of every one against every one' – are extremely closely regulated by ancient codes.[198] Today such codes are still in use even in Europe, where in Albania the Kanun Lekë Dukagjini still to some extent governs the conduct of blood feud (*gjakmarrja*) in northern reaches of that country.[199] In Afghanistan, as we shall see, the

[197] Malinowski, Bronislav, 'Introduction' to Hogbin, *Law and Order in Polynesia*, plxv, quoted in Roberts, *Order and Dispute*, p22

[198] 'Warre of every one against every one ...' Leviathan Chapter 14. In an earlier work 'De Cive', written in Latin, Hobbes says '*Ostendo primo conditionem hominum extra societatem civilem (quam conditionem appellare liceat statum naturae) aliam non esse quam bellum omnium contra omnes; atque in eo bello jus esse omnibus in Omnia.'* 'I show that the default condition of man without civilised society, a situation I call "the state of nature" is nothing less than war of each against the other, where every man's right is as good as the next man's' (author's translation from the Preface of 'De Cive')

[199] See Gjecov Shtjefen, *Kanun Lek Dukagjini* (Gjonlekaj Publishing Company, New York, 1989), translated and with an introduction by Leonard Fox. For an illustration of how the Code works today, see Finer, Jonathan, 'Albania takes aim at a deadly tradition', *Washington Post*, 23 August 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/08/22/AR2007082202862.html

Pashtunwali code is regarded as central to rule and order in those areas occupied by the Pashtun peoples. Similar codes still exist among other traditional peoples worldwide. These codes are tribal responses to the risks posited by those who adopt social contract constructs.

A primary concern of such non-state systems where disputants may be acquainted with one another (or at the very least be acquainted with the other party's family or tribe) and may do regular business, is to return the parties to a situation where they may be able to coexist. This almost invariably involves some form of compensation or, in cases of murder or assault, retribution. This in turn implies the necessity of restitution and settlement. In Western societies this form of justice is known as 'restorative justice', although the form it takes in the West is largely state organised.[200] Consequently, the function of dispute resolution in those tribal societies that use such mechanisms is less a search to determine what happened, and more an effort to determine what might be done to repair the damage, whether such harm might be characterised in other societies as criminal or civil. Law, insofar as it can be seen to exist as an abstract (about which, see below), here clearly develops as a tool for the maintenance of necessary harmony.

In larger and more complex societies where parties to disputes may not be acquainted with each other personally or have identifiable family links, states exist to control that force. 'In many or most cases in populous state societies consisting of millions of citizens who are strangers to each other, the people involved [in disputes] had no prior relationship, don't anticipate any future relationship and were brought together on a one-shot basis' by the circumstances of the dispute.[201] In such circumstances, there are clear risks to allowing unrestricted access to force by citizens, those risks having been delineated by Hobbes and others: 'a prime concern of effective state government is to guarantee or at least improve public safety by preventing the state's citizens from using force against each other'.[202] In

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[200] For example, see UK Ministry of Justice, *Restorative Justice Action Plan for the Criminal Justice System* (2012), available at https://www.justice.gov.uk/downloads/publications/policy/moj/restorative-justice-action-plan.pdf

[201] Diamond, *World until Yesterday*, p102

[202] ibid., p97

essence, this is exactly what Hobbes and his successors in the social contract movement have claimed, in order to avoid the violent anarchy that might otherwise result. Ideas of 'social contract' are clearly far easier to uphold in smaller societies, where the philosophical tool of that 'contract' is more readily derived from what actually takes place, than they are in larger, highly complex societies.

The relevance of political theory is more apparent in insurgencies than relatively stable democracies. In the nineteenth century, questions of where sovereignty resided were of immediate importance, particularly with the debates preceding the outbreak of the US Civil War. The United States Civil War is arguably the paradigm of insurgencies.

The question of whether the 'people's' will existed in the form of the federal government and the constitution of the United States, or was (or might be) superseded by other forms of the expression of their will, was central to the casus belli. For example, the question of whether the 'people' (in the form of constitutional conventions or the federal government) were supreme was key to the issue of the legitimacy of the Confederacy. For instance, a judgment handed down by the Georgia Supreme Court stated that the secession conventions, by which secession was declared in all but one state (Tennessee, which declared independence), provided a way by which people act 'in a capacity higher than and superior to any government, state or federal, theretofore created or adopted by them'.[203]

An excursion into jurisprudence

Here is not the place for a full discussion of the jurisprudential debates that have arisen from attempts to answer the question 'from where derives the human impulse to law' and 'justice', or indeed the question of what 'justice' or 'human rights' are – if indeed they 'are' anything at all. These questions have been at the heart of debates in jurisprudence for centuries. The effect of courts upon insurgencies is not at heart a jurisprudential issue, although certainly legal philosophical questions impact on the conclusions that may be drawn. There is also a risk of being drawn into unproductive debates that, for present

[203] *Mims* v *Wimberly* 33 GA 587 (1863) at 592, quoted in Neff, *Justice in Blue and Gray*, p13

purposes, are not helpful. As the scholar of jurisprudence William Twining put it, much of the discussion on legal pluralism and centralism, a key topic in this thesis, 'has been bedevilled by an obsession with perennial jurisprudential problems surrounding the concept of law and legal pluralism'.[204]

In smaller societies, as was mentioned above, it might well be argued that dispute resolution may be framed within the field of 'social contract' within the larger area of 'natural law'. But in larger and more complex systems of law, the natural law theorist, often influenced by social contract ideas, only provides one stream of thinking. Another legal philosophical flow is provided by the 'positivists', who take the alternative view that instead of there being any substance to notions of 'social contract', law is simply a result of human action and enactment. There is no morality necessary in law. 'One cannot derive an ought from an is', say the positivists;[205] put in the most simple formulation, 'because chaos might allegedly result from the absence of this or that law, there is no necessary implication that this or that law ought or should be enacted'. There is, in fact, nothing 'self-evidently right' or 'basic forms of good'[206] inherent in any law: there is no 'law' existing as a separate abstract entity. Millions of pages have been written in an attempt to reconcile the two streams of legal philosophy. Some form of synthesis was arguably achieved by H.L.A. Hart, whose views are centred on the qualities necessary for working law as opposed to the supposed nature or origin of those laws themselves. There are some rules which are necessary to ensure survival, as we are not in 'a suicide club'.[207]

An interesting empirical *anthropological* perspective is provided by Margaret Mead:

> … the culturally regulated relationship among persons within a given environment is characterised by certain persistent regularities, due to the species – specific

[204] Twining, William, 'Legal pluralism 101' (UCL Paper, 2012), p2
[205] Known as Hume's razor or the is/ought problem, it was identified, if not for the first time then most famously in the following passage from Hume's *Treatise on Human Nature* thus: 'In every system of morality, which I have hitherto met with, I have always remarked, that the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when all of a sudden I am surprised to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*'
[206] Finnis, J.M., *Natural Law and Natural Rights* (Oxford, 1980), pp84–91
[207] See Hart, H.L.A., *The Concept of Law* (Oxford, 1982), pp189–193, particularly p192

> characteristics of human beings ... the systematic observations of constancies among all known cultures make it highly probably that the kinds of cultural behaviour found in all of them have been an integral part of their survival system up to the present time.[208]

She goes on to enumerate these as including murder, regulated family life and private property. In so doing she is coming close to a social contract/natural law perspective. It may well be that some forms of insurgent (or indeed counterinsurgent) justice may cast some light on the jurisprudential aspect of the sources of law and justice. Most insurgents and counterinsurgents are initially driven by imperatives of security and, as we will see, the need to establish control in a competitive environment. Some forms of insurgent justice are entirely different from the forms against which they compete: in both the main cases that this thesis examines, Ireland and Afghanistan, the legal systems adopted and developed by the insurgent groups are very different in form from those against which they compete.

More advanced societies and the legitimate 'monopoly of force'

The key difference between developed state systems and 'less-developed' non-state systems at what might be called a tribal level is that state systems claim what is often called 'the monopoly of force'. It is important to state that such a monopoly must have a high degree of acceptance as 'legitimate'. In non-state or tribal systems, it is common for the right to use force to be claimed by individuals or tribes. All men have the right to use force to assert their rights, albeit within parameters that are well understood by the society in which they live. In such societies, there is little or no delineation between what is described in state systems as 'criminal' or 'civil' law.

Weber gives the key defining characteristic of a state as being precisely that it claims such a monopoly and refuses it to the state's constituent parts. He identifies the practice of politics

[208] Mead, Margaret, 'Some anthropological considerations concerning natural law', 6 Natural Law Forum, p51, quoted in Freeman, M.D.A. (ed.), *Lloyd's Introduction to Jurisprudence*, sixth edition (Sweet and Maxwell, 1994)

as the means by which that monopoly is administered. Clearly, the particular practice of dispute resolution, the role of 'courts', is one of those means.[209]

Weberian political ideas are deeply ingrained in Western thought. Those presumptions are not by any means present everywhere. A fine example of this can be seen in Pashtunwali – or for that matter in other similar quasi-legal or perhaps social codes, such as those referred to above. Indeed, the 'Weberian paradigm' of the 'West' may not (as will be seen below, particularly in Chapter 4) be relevant at all in those areas characterised as 'ungoverned space', where, almost by definition, the 'state' is either not present or else plays a decidedly limited role in day-to-day life. We turn now to those presumptions of Western policy that permeate all aspects of state-building.

In his article 'The three types of legitimate rule', Weber was the first to divide authority into so-called 'ideal types' – archetypes, as it were, of political power – for the purpose of discussion and analysis.[210] These three types were 'charismatic, traditional and rational legal'. Charismatic rule is founded on the individual personal charisma, inspiring devotion in followers. Traditional rule is founded essentially on the legitimacy conferred by the antiquity or supposed antiquity of a given system. Rational legal is based upon systems of rules – rule of law, perhaps. All three of these so-called 'pure types' are essentially abstract notions, useful as tools of analysis rather than to provide specific definitions. It is surely the case that most forms of political rule have elements of all three types. Insurgent systems generally fall between the last two. There are cases where charismatic rule has formed the basis of insurgent government and dispute resolution; such examples were more prevalent in former centuries, but the Lord's Resistance Army (LRA) of Central Africa may be considered to fall within that category.[211] In this thesis we will be dealing largely with 'traditional' and 'rational legal' forms of rule.

Weber sees these three notions as essentially hierarchical, developing upwards from the personal or charismatic to the rational-legal political settlement exemplified, it might be

[209] Weber, Max; '*Politics as a Vocation*' (1919)
[210] Originally published in 1922 in the *Preussischer Jahrbuch*, 187, 1–2
[211] 'Kony exercised a form of charismatic leadership, accepted by his rank and file soldiers and with no active resistance from the population.' Doom, Rudy, Valassenroot, Koen, 'Kony's message: A new Koine? The Lord's Resistance Army in Northern Uganda', *African Affairs*, 38 (1999), p22

said, in the modern Western secular democratic state. Within such secular state systems of dispute resolution there are two usually separate jurisdictions, characterised as 'civil' and 'criminal'. One arguable exception to this general rule is the system of Islamic law, the Sharia, which might be characterised as a system for the regulation of private justice, wherein the civil and criminal jurisdictions are not always clearly delineated.

When we come to discuss the situation in Islamic countries – for example, Afghanistan – the role and methods of such law may become clearer, particularly in reference to the way in which the Taliban have been operating judicially. In 'normal' Weberian states, citizens of a state are discouraged from the application of private violence by the threat of state retribution. In return, citizens of that state are assured of the state's efforts to ensure their own security. The state is 'providing a mandatory alternative to do-it-yourself justice – all other goals are subordinate to that one'.[212] In contrast to non-state systems in societies where there is some necessary degree of mutual acquaintance, the state is not primarily concerned with compensation in 'criminal' matters, as society can function without such. For example, in England and Wales the purposes of sentencing are fivefold: first, punishment; second, the reduction of crime through deterrence; third, the reform and rehabilitation of offenders; fourth, the protection of the public; and fifth, the making of reparation by offenders.[213]

The 'rule of law', monopoly and insurgency

States on the Western model aspire to the 'rule of law'. Definitions of this term are common, but agreement on what precisely it denotes is less so. The commonly quoted United Nations definition states that rule of law may be defined as

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well,

[212] Diamond, *The World until Yesterday*, p99
[213] Criminal Justice Act 2005, section 142

> measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[214]

Other authorities' definitions are not significantly different. Notable among the qualities applied by most authorities is that of 'supremacy of the law'. Clearly this strongly implies a single authority. Here sociology, as represented by Weber, and the law meet.

Insurgents generally aspire to that legitimate monopoly of force, in the same way as governments do. They see it as the key attribute of a successful state. As we shall see below, to a very great degree this goes hand in hand with 'legitimacy'. Having said that, in pluralist systems (which is to say, in those with more than one form of judicial authority) there is little in the way of monopoly. Within standard rule-of-law models there is little room for alternative sources of legal authority. Chapter 4 will demonstrate that failure to appreciate that Weberian 'monopolies' are not essential to working governance has arguably produced a decade of wasted opportunity in Afghanistan. This is particularly unfortunate, as questions of how to accommodate legally pluralistic societies were deeply studied in the nineteenth and twentieth centuries, and their positive (as well as their negative) legacies remain in many places today.

The acquisition and retention of a monopoly of force accepted by its subjects as legitimate (or at the very least supremacy) and the potential attendant support and adherence form the initial purpose of insurgent struggle. In this, insurgents are engaged in a competition for control. Clausewitz saw war as a political act;[215] in other words, it is an activity which extends beyond the arena of the application of physical force. The contemporary counterinsurgent 'practitioner' David Kilcullen rephrased classical Clausewitzian thinking thus: 'the resilience of an armed group depends on the capabilities they can bring to bear

[214] See http://www.unrol.org/article.aspx?article_id=3

[215] 'We see therefore that war is not merely an act of policy but a true political instrument; a continuation of political intercourse carried on with other means'. Clausewitz, Karl von, *On War*, Chapter 1, para 24.

across the full spectrum of a competitive control system'.[216] David Kennedy sums up what the role of law can be: 'Law itself may also be an instrument of policy, on a continuum with war – different means to the same end.'[217] Some insurgent groups have also realised this and have used that realisation to their great advantage. They will be examined in Chapter 2 and particularly Chapter 3.

Section 3

Legitimacy – the 'main objective'

'Law has become a mark of legitimacy and legitimacy has become the currency of power.'[218]

As kinetic combat takes place in a physical environment, in which all participants fight, so law may be a common language in the virtual fight for 'legitimacy'. Not all counterinsurgents understand that justice is where (as it were) the 'rubber' of governance meets the 'road' of the people. Counterinsurgents should be sure to treat it with the same regard with which some successful insurgents treat it.

From a military perspective, treating the justice sector in a post-conflict or 'state-building' context as an often unwelcome ancillary is a serious error. While the form that dispute resolution mechanisms take may change, the nature of justice as a social good is similar across all cultures. Similarly, the relationship between justice and legitimacy is often taken for granted.

To illustrate the point, I will, for a moment, come home. There may be some readers who have, at one time or another, found themselves in a British court. The fact of being in such a place has profound implications that extend beyond the fate of one's personal liberty or driving licence. For a start, there is an implicit acceptance of the court's authority. The presumption of legitimacy is so deep that it is almost never articulated. One could sit in

[216] Kilcullen, *Out of the Mountains*, p134
[217] Kennedy, *Of War and Law*, p21
[218] ibid., p45

English courts for many years without hearing the phrase 'I deny the right of this court to decide my case.' There may be those who find court rulings misconceived or just plain wrong. Arguments are often made about *jurisdiction*, but few outside the small 'insurgent' community of this country deny *the right* of the court to make those rulings. Facing everyone in a UK court (except the judge or magistrate) is a large Royal Crest over the judge's seat. For those who care to consider it, the implication is clear. Here resides authority based around common acceptance. There are no rivals to the courts here. Any proposed (or indeed existing) Sharia or Beth Din courts (dealing largely with family cases, with the consent of the litigants) will derive their authority, and more importantly the enforceability of their decisions, from United Kingdom law. When something goes wrong, whether this is government misfeasance or private crime, we rely on courts to sort it out.

The ability and acceptance of the right to adjudicate in disputes is the ultimate expression of the right to rule – indeed of 'legitimacy'. Once that sense is lost, as it was in early 1920s Ireland or early twenty-first century Afghanistan (both examined in later chapters), it is a slogging uphill struggle to get it back. Complex insurgencies are powered by injustice, corruption and a sense of illegitimacy. Contrary to received governmental wisdom, they are not generally driven by a desire to see free and fair elections. Most ordinary right-thinking people have the provenance of their government well down their list of priorities. What is important is the knowledge that if you have a dispute with your neighbour over land or with an individual over whether he stole your television set, it will be resolved fairly. Your livelihood may depend on that. In the absence of the provision of such a service, insurgents will happily and gratefully provide it themselves. Justice is a doubly dangerous weapon in the hands of an information-literate indigenous insurgent operation like the Taliban. 'Sometimes the best weapons are those which do not shoot', as the US Counterinsurgency Manual puts it.[219] Not only does the insurgent's ability to adjudicate in disputes in an accepted and purportedly fair fashion reinforce his claims to legitimacy, but it bleeds that legitimacy away from the government. As one commentator has put it, the setting up of separate courts is the ultimate 'non serviam'.[220]

[219] FM 3-24 (2006), para 1-197
[220] Mary Kotsonouris, Lecture on Dail Courts, RTE, 27 February 2009, Dublin, available on internet at http://www.rte.ie/radio1/thomasdavis/1251899.html

What is legitimacy?

Legitimacy is the bottom line of accepted counterinsurgency theory. The US *Insurgencies and Countering Insurgencies Handbook* (2014 edition of FM 3-24) declares legitimacy to be 'the main objective' of counterinsurgents.[221] No fewer than 61 paragraphs of that document mention 'legitimacy'. It declares irregular warfare to be a 'violent struggle among state and non-state actors for legitimacy'.[222] This is therefore a competition for legitimacy, one aspect of what David Kilcullen calls 'the theory of competitive control'.[223] Unlike conventionally understood forms of war, insurgency/counterinsurgency is not a contest to control territory or to destroy an enemy's ability and will to fight, but rather a competition between two opposing groups to be recognised by a particular population as its legitimate government. As he says elsewhere: 'We can beat the Taliban in any military engagement, but we're losing in Afghanistan not because we're being outfought but because the Afghan government is being outgoverned.'[224] This 'binary' approach has already been criticised in the introduction above.

Thus, law has a dual use in counterinsurgency: both a tool for defeating criminal insurgents themselves (by imprisoning them) and a means for governments to build legitimacy.[225] So what is legitimacy? And from where does it derive?

Both the British and US doctrinal documents prescribe the usual nostrums for inculcating this elusive quality of legitimacy. The 2006 edition of FM 3-24 sets out six 'possible indicators of legitimacy', which are said to include the ability to provide security, selection of leaders in a manner perceived to be just and fair, a high level of political participation, a culturally acceptable level of corruption, a culturally acceptable level of social and economic development, and a high level of regime acceptance by major social institutions.[226]

[221] FM 3-24 (2014), para 1-78
[222] FM 3-24 (2014), para 1-2
[223] Kilcullen, *Out of the Mountains*, pp116ff
[224] Kilcullen, *Counterinsurgency*, p155
[225] Nachbar, 'Use of law in counterinsurgency', p142
[226] FM 3-24 (2006), para 1-116; the 2014 edition does not set out indicators for legitimacy

Nowhere in this list is the ability to solve disputes. None of those indicators are of much use if the 'host population' turns to the 'insurgent' to solve its problems. British and US counterinsurgency doctrine adopts the solution of 'building courts and training lawyers'.[227] The British handbook, like its American counterpart (which in fairness gives a nod to informal justice mechanisms as interim arrangements),[228] mandates military lawyers to undertake 'rule of law activities'. These prescriptions are nothing more than afterthoughts, representing the notion that justice is an easy fix, brought into effect by the construction of courts and the training of lawyers and judges. This will be looked at in far more detail below.

Legitimacy and 'social capital'

Social theorists have looked at legitimacy as the product of the accumulation of social capital. That capital can take the form of such goods as roads, schools, water and electricity production and distribution. There is also the accumulation of rather less tangible 'symbolic capital': 'Symbolic capital refers to those intangible accumulations that are rich with widely socially shared meanings that are often rooted in accumulations of physical capital but nevertheless distinct.'[229]

For a state to be 'legitimate', the reservoir of 'symbolic capital' must remain above a certain threshold. In practical terms (as will be illustrated in Chapters 2 and 4), that reservoir will contain such elements as working courts, systems of enforcement of judgments and a certain minimum foundation in the relevant societies' mores and customs. It is the job of the insurgent to drain that reservoir and refill it with his own capital.

Hobbes' classic formulation posited the necessity of what amounted to a 'contract' between the subject and the sovereign. It is this formulation that lies at the root of the stream of

[227] AFM 3-40, para 12-26 and FM 3-24, paras 6-101–106
[228] FM 3-24 (2014), paras 13-65 and 13-67
[229] Anderson, E.G. and Black, L.J. 'Accumulations of legitimacy: Exploring insurgency and counterinsurgency dynamics', in the Proceedings of the International System Dynamics Conference, Boston, MA (2007), p3. They go on to postulate that legitimacy grows and wanes over time as a result of several reinforcing loops, by representing legitimacy as a 'stock', or what might be described as a finite quantity. They also rather more conceptually discuss various 'causal loops' which feed into this essential competition, touching on various species of social capital which feed legitimacy. That approach is not adopted here

political philosophy known as 'social contract theory'. The idea of the state existing to restrict uncontrolled violence through the exercise of the monopoly use of its own violence is commonly accepted: 'Every state is founded on force', said Trotsky at Brest-Litovsk. That is indeed correct. If no social institutions existed which knew the use of violence, then the concept of 'state' would be eliminated, and a condition would emerge that could be designated as 'anarchy', in the specific sense of this word. Of course, force is certainly not the normal or the only means of the state – nobody says that – but force is a means specific to the state.[230] Mao Tse Tung phrased much the same thought differently: 'Every communist must grasp the truth "political power grows out of the barrel of a gun"... all things grow out of the barrel of a gun.'[231] Such power may indeed grow from cold steel, but power itself and legitimacy are made of very different substances.

A critique from legal anthropology

The idea that societies must in some fashion be based on the threat of force is by no means accepted by legal anthropologists. Fernanda Pirie states that 'behind the Hobbes model is the idea that human beings are by nature asocial and inclined to a state of conflict unless controlled and socialised by government'.[232] She is supported in this by, among others, another leading anthropologist of law, Simon Roberts. He says that studies undermine 'a long-standing assumption that order is only conceivable if there are strong men in positions of authority ready to tell others what to do ... It is not the fault of anthropologists if the lesson of these studies, clear as they are, have yet to be absorbed by some legal and political theorists'.[233] Similarly, Malinowski, the pioneer of legal and social anthropology, was an early advocate of the idea that centralised government and laws are not necessary to the functioning of society.[234] Indeed it can be argued that even in the West, most disputes are not in fact settled through state structures, but are resolved through negotiation. It is only when such negotiation fails that, usually as a last resort, the state

[230] Weber, *Politics as a Vocation*
[231] Mao Tse Tung, *Problems of War and Strategy* (Foreign Languages Press, Beijing, 1960), available at http://collections.mun.ca/PDFs/radical/ProblemsofWarandStrategy.pdf
[232] Pirie, Fernanda, *The Anthropology of Law* (Oxford University Press, 2013), p28
[233] Roberts, Simon, 'The study of dispute: anthropological perspectives', in J. Bossy (ed.), *Disputes and Settlements* (Cambridge, 1985), p5
[234] Malinowski, Bronislav, *Crime and Custom in Savage Society* (Kegan Paul, 1934)

becomes involved. It can also be argued that some laws and codes have very little impact on how disputes are actually resolved. There are examples of societies where the law is separate from any normative function, serving rather as, at best, guidance or even ritual decoration.[235] An example of this has been cited as the 'law' of the Old Testament of the bible which is accepted as 'law' by, for example, Christians, but not implemented, albeit for theological reasons.

Jeffrey Rustand has spent two decades as a legal and justice reform advisor in many countries, and most recently has spent five years in Afghanistan. He describes the reality of Afghan regulatory life:

> Much of Afghan life is regulated by what we might call corrupt mechanisms. There are four kinds of 'corruption': simple greed, family connections, friends, networks of other kinds. This is their life, everything comes through these networks. It was, of course, the same in western countries for centuries. However our system has evolved to a state where all these types of, in our term, 'corruption' have been privatised, devolved to a state or eliminated. Afghans rely for protection on family and tribe; that's what matters. The institutions are too ramshackle and weak. No one knows what they can get away with.[236]

It may well be that this state of affairs is rather more the norm than many counterinsurgency practitioners (and certainly their literature) would care to admit. These matters will be looked at in more detail in Chapter 4.

It is certainly the case that the Hobbesian stream of thinking has been adopted by counterinsurgency theorists, as it has by 'rule of law' development practitioners. The word 'paradigm' is perhaps overused; but it entirely relevant and appropriate in this context. The paradigm of Western state-centralist 'rule of law' has dominated counterinsurgency discourse. The technical word for this approach is 'centralism', defined by John Griffiths as the approach

[235] See Pirie, *Legal Anthropology*, Chapter 2 passim
[236] Interview with Jeffrey Rustand, April 2014

> … that law is and should be the law of the state, uniform for all persons, exclusive of all other law and administered by a single set of state institutions. To the extent that other, lesser, normative orderings such as the Church, the family, the voluntary association and the economic association exist they ought to be and in fact are hierarchically subordinate to the law and institutions of the state.[237]

It is, says Griffiths, 'a myth, an ideal, a claim, an illusion'.[238] As will be seen in Chapter 4, centralism treats customary systems, which are very commonly encountered in insurgency situations, as separate from the essential centrality of the state. Deborah Isser is right when she says that customary systems must be seen 'not as an isolated phenomenon but as an undeniable component of the justice landscape'.[239]

Perceptions of fairness and legitimacy

A key element in the provision of security is the ability to apply (or threaten to apply) the dynamics of force, in the form of enforcement of social or political strictures. One central method of securing both physical and economic security is through a justice system 'of which the population approves'.[240] It is there that the justice system sits in a developed society. Rule of law promotes legitimacy in two ways: first, by restraining and defining the parameters of the state, thereby ensuring that a sense of justice is at least possible; and second, by providing a service. That service in turn affects and promotes the idea of a state, by reinforcing the state's power.

> At the heart of any counter-insurgency (COIN) campaign lies one basic requirement – the population of the territory concerned should form the perception that the government offers a better deal than do the insurgents. In this perception, security of the person and of property, and the establishment of the rule of law, are

[237] Griffiths, John 'What is legal pluralism', *Journal of Legal Pluralism*, 24:2 (1986), p3
[238] ibid., p4
[239] Isser, *Customary Justice*, p4
[240] Anderson and Black, 'Accumulations of legitimacy', p3

> paramount considerations. It follows that whatever else the government may do, it should start from that edict in the Hippocratic Oath which states: 'do no harm'.[241]

In his book *Why People Obey the Law*, Professor Tom Tyler talks about the key factor in legitimacy being the impression of procedural fairness.[242] What, though, is fairness? Is what is fair to Afghans different from what is perceived as procedurally fair in colonial Ireland of the 18th and 19th centuries, for example? It is no good just relying on common sense; perhaps we must look into social contract? If exogenous COINs can provide procedural fairness, can they develop legitimacy? Surely, according to Tyler, the answer is yes. But were not the judges of the British courts in colonial Ireland perceived to be procedurally fair?

Heather Laird, in her study of Irish subversive law, asserts that the dynamics that allowed the courts in England to gain an acceptable level of legitimacy in the key period of the late eighteenth century did not function in Ireland.[243] She counterpoints the conclusions of E.P. Thompson, who took the view that in England there was at least the perception of the *possibility* of justice.[244] Laird states that: 'In contrast it could be difficult to pinpoint any attempt during the same period in Ireland to create the appearance of legal impartiality. The penal code that operated during the eighteenth century protected protestant interests and was, therefore, "evidently partial and unjust", while "British law" was popularly interpreted as a foreign imposition that had displaced an earlier legal system.'[245] Thus, the law acted as a driver of conflict. There was little in the way of perceptions of fairness. As will be seen, the perceptions of fair process are vital to notions of legitimacy.

What is clear is that the writ of the 'crown' courts – those run by the British administration – in the sense of their accepted authority certainly did not run throughout the land. One 'resident magistrate', a representative of the lowest level of judicial authority, was often incapable of recalling that 'Ireland was a part of the United Kingdom with representatives in parliament and not a far flung colony'.[246]

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[241] Crawshaw, 'Evolution of British COIN', para 1
[242] Tyler, Tom R., *Why People Obey the Law* (Princeton, 2006)

[243] Laird, *Subversive Law in Ireland*

[244] Thompson, E.P., *Whigs and Hunters: the origins of the Black Act* (Penguin, 1975)
[245] Laird, *Subversive Law in Ireland*, p24
[246] ibid., p17

In this respect, comparisons from Afghanistan and contemporary conflict and insurgency are available, if not necessarily particularly compelling. As a specific example, Helmand is regarded as a remote, semi-detached Afghan province, but an Afghan province nonetheless. Rather more compelling is the reality in Afghanistan that the possibility of justice in fact – as opposed to the often merely virtual world of government statements – barely exists. The formal courts in Helmand (as was the case in Ireland) are not trusted as independent arbiters of disputes, but all too often are seen as the tools of those who can best afford to bribe the judges. The issue would seem to be one of procedural fairness. What evidence is there that fairness, or the perceptions of fairness, found a basis for legitimacy?

Obedience?

Compared with social theoretical studies on domestic compliance, there has been little scholarship on the questions raised by insurgency concerning obedience to legal strictures and the link between legitimacy and insurgency. This is surprising, given COIN's emphasis on legitimacy and the implicit stress placed upon it by insurgents. Clearly, any counterinsurgency campaign is ultimately concerned with applying measures to ensure that the 'target population' displays (and, to a lesser extent, feels) loyalty to the incumbent regime and veers away from the kind of armed insurrection characterised by the term 'insurgency'. As will be examined below, the failure of those incumbent systems to develop mechanisms for the resolution of embedded disputes is a trigger for insurgency. If a state has not developed adequate means to address deep-seated problems concerning the distribution or use of land, for example, it will clearly have difficulty in establishing a practical ability to govern.

Ultimately, if a state cannot make a sufficiently sound offer of government, its subjects will not obey its laws and it will have lost the ability to govern. It will fail to gain 'legitimacy'. In social contract terms, the state will have failed in its part of the bargain – to govern properly.

What makes people obey the law?

In answer to the question 'why do we obey the law?', social theory generally offers two general positions, not necessarily mutually exclusive. The first has been characterised as the

'instrumental' perspective, also referred to as 'social control'. This is concerned primarily with offering access to resources for compliance, or sanctions for failure to comply. Complementary to the 'social control' perspective has been the 'public choice' approach, which 'suggests that people are intrinsically motivated to maximize their personal gain in their behavior towards the law'.[247] Consequent to this approach, the view is taken that sanctions, as the necessary counterpoint to gain, provide the key impetus for compliance. Put very simply, the 'social control' approach posits that the key driver is a system of rewards and punishments. This might also be termed a 'transactional' approach. However, democratic societies cannot function in a purely instrumental fashion. While it is a mischaracterisation that the 'social control' model is Pavlovian, there is surely more to compliance than a simple and constant weighing up of rewards and costs: 'it may not be effective enough to allow a complex democratic society to survive'.[248]

There is a further problem with the social control approach: 'Citizens have been found to obey the law when the probability of punishment for non-compliance is almost nil and to break laws in cases involving substantial risks.'[249] At a mundane metropolitan level, what is it that makes people decide not to drink and drive, or indeed to pay taxes in an honest and full fashion?

The second approach is known in general terms as the 'normative approach', which takes what might be regarded as a more nuanced view of the problem. Tom Tyler posits that the strongest motivation for obedience to the law is not externally imposed, but is, in fact, what he calls 'internalised obligation', a major component of this being 'legitimacy':

> From the perspective of the authorities in a political or a legal system, legitimacy is a far more stable base on which to rest compliance than personal or group morality, for the scope of legitimate authority is much more flexible. It rests on a conception of obligation to obey any commands an authority issues so long as that authority is

[247] Tyler, *Why People Obey the Law*, p21. See also Sunshine, J. and Tyler, T., 'The role of procedural justice and legitimacy in shaping public support for policing', *Law and Society Review*, 37:3 (2003), p513. 'The procedural justice perspective argues that the legitimacy of the police is linked to public judgements about the fairness of the processes through which the police make decisions and exercise authority' (p514).
[248] Tyler, *Why People Obey the Law*, p23
[249] ibid., p22

> acting within appropriate limits. Leaders with legitimate authority have open-ended, discretionary authority within a particular range of behavior.[250]

This is known as the 'Tyler Rasinski Hypothesis'. Its conclusions were challenged in a subsequent study by Jeffrey Mondak, whose conclusions were that the influence of procedural propriety was 'much less forceful' than was suggested by Tyler and Rasinski.[251] However, that study was primarily concerned with the acceptance of high-level appeal-court decisions.

The case Tyler makes is not that legitimacy displaces the social control approach, but rather that legitimacy is an important element in the exercise of authority. In 1984, alongside Kenneth Rasinski, he conducted an extensive empirical study, known now as the Chicago study,[252] to determine what it is that motivates that 'internal' obedience. This study was extensive and comprehensive. Its conclusions were equally complex. However, one particular aspect was clear: 'The way people assess procedural fairness is strongly linked to their judgements of whether the authority they are dealing with is motivated to be fair.'[253] Tyler concludes that:

> People obey the law because they believe that it is proper to do so, they react to their experiences by evaluating their justice or injustice and in evaluating the justice of their experiences they consider factors unrelated to outcome such as whether they have had a chance to state their case [or 'distribution of control' as he calls it in the study's findings] and been treated with dignity and respect. On all these levels people's normative values matter, influencing what they think and do ... Attitudes and behavior are influenced to an important degree by social values about what is right and proper.[254]

This conclusion may seem to be in accordance with intuition, but what Tyler offers is empirical evidence that this is the case.

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[250] ibid., p26
[251] Mondak, Jeffrey, 'Institutional legitimacy and procedural justice: re-examining the question of causality', *Law and Society Review*, 27 (1993), p608
[252] Fully reported in Tyler, *Why People Obey the Law*. See also Tyler, Tom R. and Rasinski, Kenneth, 'Procedural justice, institutional legitimacy and the acceptance of unpopular US Supreme Court decisions: a question of causality', *Law and Society Review*, 25:3 (1991), p 469
[253] Tyler, *Why People Obey the Law*, p164
[254] ibid., p178

The importance of procedural fairness and its perception may be clear in societies with structured legal regimes[255]. The same seems to be the case with respect to *some* 'stateless' systems of governance and dispute resolution. The *xeer* system in Somalia is based around submitting disputes to nominated respected representatives of tribal or 'clan' groups, individuals who are chosen for their impartiality and knowledge of tradition. A hearing is held, at which both sides present their 'cases', as it were. The nominated elders arrive at a decision and the parties are encouraged to accept it:

> Whether such a decision sticks depends upon whether both parties feel the judgement to be fair, on their eagerness to have the matter settled and the pressure which their respective kinsmen and associates can bring to bear upon them. Even if the decision is not accepted, its outcome will clearly provide an important bargaining counter in subsequent negotiations.[256]

Implications for insurgents and counterinsurgents of considering a normative model

The key point to be drawn from Tyler's conclusions is that obedience is conditional upon legitimacy – as far as it goes, this is what the newer iterations of COIN suggest. But, he suggests, legitimacy is itself conditional on fair dealing by the authorities with the 'customers' of the service provided. This in turn requires a deep awareness not only of the systems of dispute resolution, but of the way in which disputes are perceived and of who, if anyone, has the authority to resolve them. Clearly 'fairness' is to a great extent a moveable concept. In a largely stateless society, such as in the Somali example, the concept of 'legitimacy' may well be rather more individually or tribally based than institutionally or indeed be based upon notions of 'honour'. Societies such as this are not rare outside the Western context, as will be seen in Chapter 4.

The implications of this are extensive, *if* they can be applied to Afghanistan or elsewhere. It casts doubt on the 'armed alms-giving' and 'institution-building aspects of

[255] For an example of how Tyler's ideas translate in legal development work to systems with some form of established system of law, see Alkon, Cynthia, *Plea- bargaining as a legal transplant'* Transnational Law and Contemporary Problems Vol 19 p 355 at pp 379-384

[256] Roberts, *Order and Dispute*, p100. See also Lewis, Ioan and Samatar, Said, *A Pastoral Democracy* (James Currey, 1999), pp229–234

counterinsurgency as supports for legitimacy.[257] The implication here is that, without what might be called 'fair dealing' (with the cultural caveat mentioned above), no amount of granting of physical goods (or indeed social goods) will work in what amounts to a system that either is or is perceived to be corrupt or for that matter outside applicable social mores.

Justice may be a key factor in insurgencies. Because if a state is not able to dictate how disputes are resolved – a contemporary expression of 'monopoly of force' – it surely can have no claim to legitimacy. This does not necessarily imply that the state does the dispute resolution in the form of courts; it may mean the state devolving that responsibility to a non-state actor, or indeed the state having little, if any, practical role in basic dispute resolution at all. In Ethiopia, however, the reality of a multi-ethnic and deeply multi-cultural state is reflected in a constitution which allows extensive latitude to the various approaches to governance – in other words a deep and explicit legal pluralism.[258] In some ways this fundamentally challenges the Hobbesian (or almost any) form of the 'state monopoly on the use of force' model. It is worth remembering that even in highly regulated societies such as the Western model, most dispute resolution on a day-to-day basis is done outside any formal context. It is only when that fails that the state, in the civil context, is invited by one or both parties to become involved.

The important factor is only that, in cases where there are non-state options, the state is seen as the arbiter, whether in form or substance – as is the case, in fact, in pluralist constitutions such as Ethiopia's and as will be seen below in chapter 4, in colonial 'dual mandate' systems. The fact that non-state actors (a vital distinction from *anti-state actors*) may be 'doing' justice in itself need by no means imply a reduction in legitimacy. On the contrary, it is simply an acceptance of reality and a state endorsement of that reality. Clearly, as we shall see when we look at the Afghan case (and others), when the state, in that case encouraged by foreign interveners, tries – however ineptly – to impose a system that is foreign to, and distrusted by, the great majority of citizens, the state sets itself against those citizens.

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[257] Gentile, *Wrong Turn*; Porch, *Counterinsurgency*

[258] See, for example, Abdo, Mohammed, 'Legal pluralism, sharia courts and constitutional issues in Ethiopia', *Mizan Law Review*, 5:1 (2011), available at http://www.ajol.info/index.php/mlr/article/view/68769 This outlines what might well be described as a 'hands-off' approach on the part of the state towards, in this case, Sharia judgments. Much the same approach is taken with respect to decisions of *xeer* 'tribunals' in the Somali region

It is into situations like this that the insurgent, the subversive, will insinuate himself. He will seek to offer an alternative to the state-provided version. He will place great emphasis on making that version work. The more such an alternative works, the more it is embedded; set against a state version that clearly (or apparently) does not.

Parallel systems in the West?

In Chapter 3 of this thesis, insurgent courts will be examined in the context of their role in 'shadow states'. In Chapter 4, the idea of legal pluralism will be addressed in the context of insurgency. However, neither 'alternative' judicial means of dispute resolution nor ideas of legal pluralism are confined to insurgent combat zones. Alternative systems of justice do not necessarily impact on the legitimacy of the state, even in the West.

Even within modern democratic Western societies, there are occasions when questions or controversies arise which highlight and illustrate that link between the authority of courts and legitimacy. Even in highly developed Weberian societies such as the United Kingdom, the idea of legal pluralism is not entirely alien, and there have been occasions outside the forum of civil war when the concept of pluralism has been argued. Pluralism does not necessarily undermine concepts of legitimacy. Proponents of legal pluralism, usually arguing from a religious perspective, would not contend that acceptance of the legitimacy of one system, even within one state, implies the illegitimacy of all others within that state. It is not, as it were, a zero sum idea. Rather, they posit that legitimacy is not necessarily rooted in one stream of authority. Such ideas are controversial in Western societies. One such controversy arose when there were moves in the United Kingdom to allow some degree of jurisdiction, particularly in family matters, to religious courts – specifically the Sharia courts of the Islamic community and the Beth Din courts of the Jewish community. Particular comment was occasioned by a statement from the Lord Chief Justice of England and Wales, Nicholas Phillips:

> There is no reason why Shari'a principles, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution [with the

> understanding] ... that any sanctions for a failure to comply with the agreed terms for mediation would be drawn from the laws of England and Wales.[259]

It is fair to say that this statement and others by similarly prominent public figures, such as the Archbishop of Canterbury, have stressed arguments directed at promoting 'custom and community'.[260] Opponents have been clear that providing some limited legal authority for Sharia courts was the first step towards supplanting English law:

> Their [supporters of Shari'a courts] ultimate goal is to supplant existing governments with Islamic theocracies. Their tactics are evidenced worldwide and take the form of terrorism, coercion, litigation, lobbying, and stifling free speech. Providing Shari'a courts with the full force of British law is much more likely to be viewed by radicals as opening the door to achieving their ultimate goals, rather than as a final concession by the British government.[261]

Further equally fundamental objections to allowing any jurisdiction at all to Sharia courts involved human rights, particularly the treatment of women in probate and divorce matters.[262] Concerns such as these led to the introduction by Baroness Cox in 2012 of the Arbitration and Mediation Services (Equality) Bill,[263] the intention of which, among other provisions, was to ensure that Islamic courts in the UK complied fully with national law concerning equality,[264] and that no claim of 'the powers and duties of a court' would be lawful.[265] Concerns about parallel systems of justice are not confined, therefore, to the world of insurgencies and rebellions.

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[259] Speech of Lord Chief Justice, 3 May 2008, at the London Muslim Centre: 'Lord Chief Justice celebrates equality before the law', press release available at http://www.judiciary.gov.uk/media/media-releases/2008/1208

[260] For example, the Archbishop of Canterbury, who stated that Sharia law is 'unavoidable'; see BBC, 'Sharia law is "unavoidable"', BBC Online, 7 February 2008, available at http://news.bbc.co.uk/1/hi/uk/7232661.stm

[261] Weiss, Deborah, 'Britain's No Sharia Campaign', *American Thinker*, 18 November 2008, available at http://www.americanthinker.com/2008/12/britains_no_sharia_campaign.html

[262] For example: 'If we ignore wrongs we condone them', *Independent*, 20 June 2011, available at http://www.independent.co.uk/news/people/profiles/baroness-cox-if-we-ignore-wrongs-we-condone-them-2299937.html

[263] Arbitration and Mediation Services (Equality) Bill, 2010–12, H.L. Bill [72] cl. 1 (Eng. and Wales); text available at http://www.publications.parliament.uk/pa/bills/lbill/2013-2014/0020/14020.pdf

[264] ibid., cl 1

[265] ibid., cl 6. For further discussion of the issues raised, see Maret, Rebecca E., 'Mind the gap: The Equality Bill and sharia arbitration in the United Kingdom', *Boston College International and Comparative Law Review*, 36:1 (2013), available at http://lawdigitalcommons.bc.edu/iclr/vol36/iss1/7; for a full discussion of the legal issues

Section 4

Lawfare: synthesising law and insurgency

The term 'lawfare' itself seems first to have appeared in 2001, in an article by an American Air Force Judge Advocate, Charles Dunlap, in a working paper for a conference at Harvard University.[266] In a later essay, written when the topic of 'lawfare' had well and truly entered common discourse,[267] Dunlap took the view that law had become a 'decisive element of 21st century conflict'. He went on to cite the way in which opponents of the US conduct of the war in Afghanistan had criticised the use, for example, of drones. Has law, asks Dunlap, become 'a tool for the enemy'?[268] In the UK, the issues often referred to in the US as 'lawfare' have become part of the national discourse,[269] as a result of several cases decided in UK courts arising out of events in Iraq and Afghanistan.[270] This has been described as the 'juridification' of (in this instance) the British armed forces.[271]

In *War and Law*, David Kennedy observes that war, like other forms of discourse, is governed by rules. Indeed, it is regulated by law:

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raised, see Reiss, Maria, 'The materialization of legal pluralism in Britain: Why Sharia Council decisions should be non-binding', *Arizona Journal of International and Comparative Law*, 26 (2009)

[266] Dunlap, Charles, 'Law and military interventions: Preserving humanitarian values in 21st century conflicts', Harvard University Kennedy School of Government, Carr Center for Human Rights Working Paper, 29 November 2001, available at http://people.duke.edu/~pfeaver/dunlap.pdf

[267] Dunlap, Charles, 'Lawfare: A decisive element of 21st century conflict', *Joint Forces Quarterly*, 59 (2009), p34, available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/law_national_security/LawfareDunlapJun09.authcheckdam.pdf

[268] ibid., p34

[269] For example, Ledwidge, Frank, 'Soldiers shouldn't need to go to law for justice', *The Times*, 20 June 2013, available (through paywall) at http://www.thetimes.co.uk/tto/opinion/columnists/article3795482.ece; see also Tugendhat, Tom and Croft, Laura, 'The fog of law: an introduction to the legal erosion of British fighting power' (Policy Exchange, 2013), available at http://www.policyexchange.org.uk/images/publications/the%20fog%20of%20law.pdf

[270] Particularly the case of *Smith and Others* v *Ministry of Defence*, judgment available at http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2012_0249_Judgment.pdf

[271] For example, Heron, C.P., 'The juridification of the British armed forces' (Shrivenham Defence Research Paper, 2013 unpublished)

> We know the corporate world can kill … law addresses these wrongs, parsing them out – permissible injuries or violations of the duty of care. We insure, we contract out, we buy property elsewhere, we zone the city to reduce or concentrate the threat – we sue, we negotiate, we demand regulation or prosecution or the death penalty. Somehow we thought war was different. But it turns out not to be.[272]

The idea of law being used as a weapon is arguably as old as international law itself. Certainly in the twentieth century it was a common feature of the discourse of conflict; territorial claims were discussed in terms of legal right. Ideas of law and legitimacy were used during the Second World War to achieve political effect. For example, after the Warsaw Uprising of 1944, Churchill levered the international law on the treatment of prisoners of war to ensure the safety of the captured Polish Home Army fighters.

At the grand strategic level, where debate on the legal aspects of war played a major role in the creation of narrative, no country could afford to be credibly accused (at least after the Second World War) of acting outside the law. However egregiously a country behaved, or indeed behaves, the language of law is used to justify that action. It hardly needs to be said, but it is a worthwhile observation that no country will ever admit to acting outside international law.

As well as being used as a justification, law is also used instrumentally. Combined with a significant level of realpolitik, over the last decades it has been used to produce strategic effect. For example, the removal of Taiwan from its seat representing China at the United Nations has been seen as a component of a long-term political effort to deny Taiwan legitimacy.[273] Law and war, particularly *through* the twentieth century, were intimately intertwined. Questions of law have always infused questions of *ius in bello* and *ius ad bellum*. As David Kennedy puts it: 'Law and force flow into one another. We make war in the

[272] Kennedy, *Of War and Law*, p114

[273] See, for example, Cheng, Dean, 'Winning without fighting: Chinese legal warfare' (Heritage Foundation, 2012), available at http://www.heritage.org/research/reports/2012/05/winning-without-fighting-chinese-legal-warfare See also Delex Systems, 'China's three warfares', 12 January 2012, available at http://www.delex.com/data/files/Three%20Warfares.pdf

shadow of law and law in the shadow of force. Law has infiltrated the decisions to make war and crept into the conduct of warfare.'[274]

The setting up of the various ad hoc war crimes tribunals in the 1990s added another rather more obvious lawfare component to the conduct of warfare. The strategic effect of the indictment of Slobodan Milosevic by the International Criminal Tribunal for the Former Yugoslavia (ICTY) certainly contributed to the overall NATO political strategy of the marginalisation of Serbia.[275] Serbian nationalists have always regarded the ICTY as a political tool in a continuing campaign against their country.[276] In the current decade, 'Laws ascendance as a means of warfare is tied to the ascendance of counterinsurgency as a form of warfare.'[277]

'Today, lawfare is used often as a label to criticize those who use international law and legal proceedings to make claims against the state, especially in areas related to national security.'[278] This 'label' is often used by those who respond in the affirmative to Dunlap's question 'Has law become a tool for the enemy?' The approach is epitomised by the 'Lawfare Project', a New York-based blog, whose declared aim is 'safeguarding against the abuse of law as a weapon of war'.[279] Much of its content seems to be directed at criticising legal challenges to the Israeli state, and purported threats to democratic discourse in Europe and the US by Muslim organisations. In a blog entry to *Small Wars Journal*, scholar of counterinsurgency Shane Bilsborough takes as a 'case study' of the use of 'lawfare' the efforts by Palestinians to bring alleged abuses by Israeli forces to public attention during the first Palestinian *intifada*. No litigation resulted from these efforts, and the only legal element of this 'lawfare' seems to have been the assertion that the actions were illegal. Legal issues

[274] Kennedy, *Of War and Law*, p165
[275] Summarised at http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan.pdf
[276] For one of many examples, 'The Serbs have always seen the ICTY as a political and not a legal body', at http://serbianna.com/analysis/archives/1708
[277] Nachbar, 'Counterinsurgency, legitimacy and the rule of law', p27
[278] Cleveland Experts Meeting, 'Is lawfare worth defining? Report of the Cleveland Experts Meeting, September 11, 2010', *Case Western Reserve Journal of International Law*, 43:11 (2011), available at http://law.case.edu/journals/JIL/Documents/43_Lawfare_Report.pdf
[279] See http://www.thelawfareproject.org/

were raised in the Palestinian media campaign only to 'leverage international concern'.[280] In other words, they were a rhetorical device rather than a legal mechanism.

There is no question that awareness of the potential of the use of law as a weapon is growing. For example, China is said to maintain an entire department of the People's Liberation Army specialising in the strategic use of law as a weapon,[281] within the framework of the idea of the 'three warfares' (legal, media and psychological operations).[282]

Among advocates of 'lawfare' as something new, there is an awareness of the fact that war is a political tool and that law is a component of political discourse. Certainly, as advocates of lawfare as something new and perhaps even threatening would acknowledge, there is political or even military effect of the kind of 'lawfare' they describe. The declaration in 2013 of an Air Defence Identification Zone by China over key parts of the East China Sea (and China's subsequent narrative positioning) has been cited as a recent example of strategic-level lawfare;[283] indeed the use of lawfare as part of the political component of warfare is the central point. Yet there is nothing new or especially threatening about the use of law as a rhetorical instrument of policy, so long as it is fully realised that this is what is happening and appropriate countermeasures are adopted.

Section 5

Strategic lawfare and narrative

The great conservative philosopher Joseph de Maistre, writing shortly after Waterloo, famously said that battles are won or lost in the imagination, not on the battlefield. This was, as James Whitman has said, 'a *bon mot* not a scholarly argument';[284] nonetheless the importance of 'narrative' to warfare is as central now as it ever was. As may be clear from the foregoing, much of that 'narrative' is conducted on the terrain of the law.

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[280] Shane Bilsborough, 'Counterlawfare in counterinsurgency', *Small Wars Journal* (December 2011), available at http://smallwarsjournal.com/jrnl/art/counterlawfare-in-counterinsurgency
[281] Cheng, 'Winning without fighting'
[282] See also, for example, Lawfare, 'Lawfare analysis on Defense Department report on China', 21 August 2011, available at http://www.thelawfareproject.org/Blog/lawfare-analysis-in-defense-department-report-on-china.html
[283] Keck, Zachary, 'With Air Defense Zone, China is waging lawfare', *The Diplomat*, 30 November 2013, available at http://thediplomat.com/2013/11/with-air-defense-zone-china-is-waging-lawfare/
[284] Whitman, *Verdict of Battle*, p40

As observed above, the relations between states are closely linked with international law. The controversies surrounding most (perhaps all) international conflicts are often communicated through the language of law. Borders are set by legal means, even though those borders may bear little relationship to areas occupied by peoples or tribes. On occasion, the controversies surrounding these controversial borders turn on the construction of a very few words or phrases. As David Kennedy says:

> War takes place on a terrain that is intensely governed – not by unified global institutions but by a dense network of rules and shared assumptions among the world's elites.[285]

The implications of such rules and assumptions can be vast, especially for the physical terrains – literal 'territories'. By way of illustration, the Durand Line, drawn in the late 1890s by a team of British surveyors, largely governs the border between what is now known as Pakistan and Afghanistan. It also applies to the virtual territory of discourse and argument – narrative.

The effect of a consistent 'narrative of justice' and indeed notions of 'fairness' and 'legitimacy' are amply displayed in the Irish struggle for independence, which was an insurgency which lasted centuries and which was, to a very great degree, powered by notions of legitimacy and justice.

As David Betz says, 'No narrative can survive, even in part, if it is based on a lie.'[286] This is true, and it is equally true that the Taliban narrative (which will be looked at extensively below) is not based upon a 'lie', whereas the Afghan government's 'offer' very largely is, in that its offer of a working, fair justice system is largely illusory, as will be argued in Chapter 4. The idea that a 'narrative' backed by factual or perceptual truth is vital to the conduct of war is reinforced in Emile Simpson's *War from the Ground up*. In writing about the contemporary Taliban's approach to rhetoric, Simpson says that

> … to base one's entire strategy upon perception rather than on the reality that lies beneath it is highly unstable. In the aftermath of the global financial crisis, it is clear

[285] Kennedy, *Of War and Law*, p25
[286] Betz, D., 'The virtual dimension of contemporary insurgency and counterinsurgency', *Small Wars and Insurgencies*, 19:4 (2008), p519

> that narratives which depend massively on perception without a base in physical reality are very dangerous.[287]

Nonetheless, there is no doubt at all that what government officials often call 'optics' is important. In other words, what appears to be happening, as opposed to what might actually *be* happening. This is the province of 'media operations' or 'psychological operations' – categories now subsumed under the rubric 'information operations'.

Military doctrine is not blind to the necessity of maintaining a link between what is asserted by the counterinsurgent and what goes on in fact. It makes the link between honesty in narrative and legitimacy. 'Counterinsurgents seeking to preserve legitimacy must stick to the truth and ensure that words are backed up by deeds.'[288] From the perspective of justice and courts, any rhetoric of justice founded on a reality of corruption will fail to ground a legitimate state, as observed above.

In his book on contemporary strategy, Hew Strachan refers to General Rupert Smith in seeing

> ... contemporary warfare [as] a form of theatre played out by a small, separate group (i.e. a professional and not a conscript army) orchestrated by a team of unseen directors, stage managers and lighting engineers, but watched by many more. The people are the audience for war.[289]

This applies at least as much when the activities played out are judicial in nature. Courts are one of those scenes in Smith's theatre. For example, in Chapter 2, when we look at the insurgent tactic of 'rupture', it will be seen that the effect of that strategy depends entirely on there being an audience – not only in the courtroom itself, but in wider society, and particularly the media. Those scenes may be played out in the reports of legal cases (as will be seen when the activities of the courts in the Malaya insurgency are discussed in the next chapter).

[287] Simpson, Emile, *War from the Ground Up* (Hurst, 2013), p218
[288] FM 3-24, para 1-13
[289] Strachan, Hew, *The Direction of War* (Cambridge University Press, 2013), p279

Within the legal domain, however, no 'play' is more effective at establishing legitimacy than the establishment of insurgent courts, which provide the métier for Chapter 3.

Chapter conclusion

This chapter has briefly surveyed the concepts that will ground the remainder of this thesis. It has looked at the concept of legitimacy, at how it impacts on, and is impacted by, insurgency, and at the importance of challenges to that legitimacy. The role of law and courts in a working society has been addressed, as has the importance of perceptions of fairness in bolstering legitimacy in a state. The chapter has looked at the way military doctrine has defined the involvement of the 'rule of law' and therefore circumscribed the effectiveness of counterinsurgency itself by absorbing purely Western notions of state and governance.

It seems clear that counterinsurgency theory has not addressed the extensive jurisprudential scholarship concerning legal pluralism. It has, or seems to have, assimilated uncritically Western notions of state centralism and 'rule of law'. In that sense, it may well be set up, as currently constructed, to fail. One problem faced by counterinsurgent doctrine is that it is bound to notions of state centralism which are inapplicable to many of the societies within which they operate. Counterinsurgent doctrine and (as will be seen in Chapter 4) practice are wedded to notions of the 'state'. In turn, these give rise to secondary obligations concerning such laudable aims as 'rule of law' and 'human rights', which, if applied, may conflict with the operational imperative to win an insurgency. It has been argued here that 'the people' are not passive objects but active agents.

The objective of this chapter has been to contribute to answering the second research question about what the justice sector can tell us about the validity of population-centred counterinsurgency as a doctrine. It does seem as if it may well be too centred within its own society. This possibility will be tested further in Chapter 4.

The chapter has also aimed to support the assertion that counterinsurgents need to understand the requirement of the necessity for a 'judicial strategy' (the third research question). This, in turn, requires an active awareness of international law concerning the status of insurgents, as there is the ever-present danger of domestic legislation, for

example, impacting on the legitimacy of an insurgent ‘state’, such as the self-proclaimed Islamic State.

The use of courts, tribunals and dispute resolution mechanisms as a weapon both by insurgents and counterinsurgents is an aspect of what has become known as lawfare, and this chapter has defined where lawfare may sit within counterinsurgency. In turn, these matters inevitably feed into a vital narrative. The next chapter will look at how counterinsurgents have used their own courts in insurgencies, and how those courts have been used against them.

CHAPTER 2

Using Counterinsurgent Courts

'No country which relies on the law of the land to regulate the lives of its citizens can afford to see that law flouted by its own government, even in an insurgency situation. In other words everything done by a government and its agents in combating insurgency must be legal.'[290]

Introduction

In his *War and Law*, David Kennedy describes war as a 'legal institution'.[291] By that he means that the conduct of war and war itself take place in a legal environment: 'Law itself may also be an instrument of policy, on a continuum with war – different means to the same end.'[292] The conduct of war, he points out, is heavily regulated, and law is a constant influence on participants in warfare. This is true, and it is that insight which informs this thesis: the idea that law itself and the practice thereof may play a part analogous to armed force and complementary thereto – in other words, as another weapon in the arsenal of the combatants. It is this idea that forms the core of the concept of 'lawfare' and which lies at the heart of this thesis. This chapter looks at how counterinsurgent warfare has been conducted through the medium of courts.

A full awareness of this field of activity and its importance requires an appreciation that a strategy needs to be formulated as to the approach to be taken by the counterinsurgent to justice, preferably prior to a full commitment being made to the campaign. As will be seen in this chapter**,** choices have to be made as to whether courts are to be used as a simple weapon, or as a tool to try to entrench 'rule of law' and therefore legitimacy. There will be costs involved in either approach.

Section 1 looks at the dilemmas facing counterinsurgents in terms of how the law and courts are used against insurgents. It is framed by what has been called here 'Kitson's dilemma',

[290] Kitson, *Bunch of Five*, p289. See also Thompson, *Defeating Communist Insurgency*, pp52ff
[291] Kennedy, *Of War and Law*, p13ff
[292] ibid., p21

which might be summarised by the question 'Should the law and courts be mere adjuncts to state power, or should there be adherence to the "rule of law"?' The section centres on a case study of how the British conducted the legal arm of their campaigns of the 1950s.

Section 2 looks at the courts of 'incumbents',[293] and at what tactics have been (or could be) used by insurgents to undermine the efforts of incumbent or counterinsurgent forces. Such techniques include 'rupture strategy', where the legitimacy of a given court – or its right to decide – is challenged. Also discussed is 'disruptive litigation', where the decisions of courts can be used either deliberately ('hostile disruptive litigation') or collaterally ('non-hostile disruptive litigation').

Section 1

Kitson's dilemma

In a seminal essay on lawfare and counterinsurgency, Thomas Nachbar questions whether the law, or mechanisms of justice, can be used firmly by counterinsurgents to promote legitimacy, or whether it will necessarily be perceived as unfair and will thereby undermine legitimacy.

> Perhaps the most meaningful indicators of the legitimacy of any state are the rules (and even more importantly the degree to which the state follows them) that govern its exertion of force, especially exertion of force against its own citizens. By announcing and demonstrating their commitment to these rules, counterinsurgents can enhance the government's legitimacy and weaken the insurgents.[294]

This question is echoed by an earlier practitioner of counterinsurgency. In his *Low Intensity Operations*, a work (written during a sabbatical from military service at Oxford University in

[293] A useful term adopted by Stathis Kalyvas
[294] Nachbar, 'Use of law in counterinsurgency', p155

1970)[295] that synthesised his experiences into what amounted to a doctrinal treatise, General Frank Kitson looks at the dilemmas presented by the use of justice as a weapon. He advises that:

> … the military leadership should present to the supreme council a number of issues of joint military-civilian co-operation on which firm policy rulings should be taken before operations against those practising subversion can start. An excellent example concerns the way in which the law should work. Broadly there are two possible alternatives, the first one being that the law should be used as just another weapon in the government's arsenal and in this case it becomes little more than a propaganda cover for the disposal of unwanted members of the public. For this to happen efficiently the activities of the legal services have to be tied into the war as discreetly as possible ... the alternative is that the law should remain impartial and administer the laws of the country without any direction from the government.[296]

For governments concerned with the conduct of operations within a legal framework, this is an exceedingly difficult balance to strike. As will be seen below, Kitson's dilemma was extremely familiar to those closely involved in counterinsurgency operations in the 1950s.[297] In *The British Way in Counterinsurgency 1945–1967*, David French quotes the assistant secretary at the Colonial Office with responsibility for Palestine in 1946:

> The plain truth to which we firmly shut our eyes is that in this emergency Regulation Detention Business we are taking a leaf out of the Nazi book, following the familiar error that the end justifies the means (especially when the means serve current expediency). We are out to suppress terrorism and because we can find no better means we order measures which are intrinsically wrong, and which since their consequence is evident to the whole world, let us in for a lot of justifiable and unanswerable criticism.[298]

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[295] Cobain, Ian, *Cruel Britannia: A secret history of torture* (Portobello, 2012), p171. Kitson was a contemporary at University College Oxford of Bill Clinton
[296] Kitson, *Low Intensity Operations*, p69
[297] French, *British Way in Counterinsurgency*, p82
[298] ibid., pp81–82

This line of argument is perennial, especially in times of stress or perceived stress. There is a long line of legal decisions dealing with this issue. The most famous of these judgments was delivered by Lord Atkins in 1941, in the case of *Liversidge* v *Anderson*, with the often-quoted lines:

> In England amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which we are now fighting, that the judges ... stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.[299]

What is rather less well known is that Lord Atkins was in the minority in the case concerned; the majority judgment of the court went against him. More recently, Israeli Supreme Court judge Haim Cohen summarised a similar point for Israel:

> What distinguishes the war of the State from the war of its enemies is that the State fights while upholding the law, whereas its enemies fight while violating the law. The moral strength and objective justness of the Government's war depend entirely on upholding the laws of the State: by conceding this strength and this justness, the Government serves the purposes of the enemy. Moral weapons are no less important than any other weapon, and perhaps more important. There is no weapon more moral than the rule of law. Everyone who ought to know should be aware that the rule of law in Israel will never succumb to the state's enemies.[300]

As an instructive example of the tensions inherent in the dilemmas facing a fully engaged counterinsurgent state, we turn now to the approach taken by the British in the 'high period' of counterinsurgency, during the withdrawal from Empire.

The 'classic period' of counterinsurgency

This global withdrawal, with its many 'small wars', rarely involved the imposition of martial law (By 'martial law' is meant rule by military authorities.) The sources of the British approach to legislation in insurgency may be found in the idea that while 'British domestic

[299] *Liversidge* v *Anderson*, 3 All E.R. 338, 361 (1941) (Atkins, L.J., minority opinion)
[300] Israeli Supreme Court judgment H.C. 320/80, *Kwasama* v *Minister of Def*., 5(3) P.D. 113, 132

law did not recognise a state of siege, British Colonial Law did'.[301] Rather than institute states of martial law, the British colonial powers, and indeed (as will be seen) eventually the domestic government in Northern Ireland, developed a system of 'emergency powers'.

David French, in his study of post-Second World War British counterinsurgency, has looked closely at the legal framework behind Malaya, and indeed Kenya and Cyprus. He identifies a 'pyramid of committees' as the chosen mechanism.[302] He points out that the legal basis upon which most of the actions described above were taken was the Emergency Powers Order in Council 1939, which granted colonial officials very wide latitude of action. Although, between the wars, the British had relied upon what amounted to martial law,[303] during the 1930s, partly as a result of events in Palestine, there was an extended shift towards moving judicial authority closer to civilian control in the form of so-called 'emergency regulations'. This culminated in the Emergency Powers Act 1945,[304] which itself evolved out of a long line of Orders in Council that largely dealt with the insurgencies in Palestine in the 1930s.[305] The situation was later summarised by Governor General of Malaya Sir Henry Gurney:

> In Palestine ... the Emergency Regulations were continually being added to and tightened up, so that at the end it might almost have been said that the whole book of regulations could have been expressed in a simple provision empowering the High Commissioner to take any action he wished.[306]

While delegating all power to the discretion of the High Commissioner may have been in the strictest sense 'lawful', it can hardly – at least by today's standards – be described as in accordance with the rule of law.

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[301] French, *British Way in Counterinsurgency*, p76

[302] ibid.,p74

[303] Defined as 'Government by the Military Authorities when the normal machinery of government has broken down as a result of invasion, civil war or large scale insurrection ...' *Oxford Dictionary of Law*, Seventh Edition (OUP, 2009). Martial Law was proclaimed on 29 September 1936 in Palestine, but not put into force

[304] Emergency Powers Act 1945; 8&9 Geo. 6 ch 31 (1945)

[305] For example: Government of Palestine Ordinances, Regulations, Rules, Orders and Notices 259 Suppl no 2 to Palestine Gazette Extraordinary no 584 (19 April 1936) (Government Printing Press, 1936); Government of Palestine Ordinances, Regulations, Rules, Orders and Notices no 723 (30 Sept 1937). For a wider view of the British approach in Palestine, see Hughes, 'Practice and theory of British counterinsurgency'

[306] Dispatch to Colonial Office of 5 May 1949, quoted in Coates, *Suppressing Insurgency: An analysis of the Malayan Emergency 1948–54* (Westfield Press, 1992), p46

The Emergency Powers Act 1945 itself derived from a 1939 Order in Council,[307] which provided for a colonial governor to enact measures that might well be regarded as arbitrary and oppressive. In cases of 'public emergency':

> The Governor may make such Regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.[308]

There then follows a list of actions that may have to be considered, including detention and expulsion of suspects,[309] sequestration of property,[310] summary suspension or indeed application of any law,[311] and the trial and punishment of offenders.[312] Such powers could be delegated to any person by the governor of the colony, and such powers as were declared in force were not to be restrained by pre-existing legislation.[313]

Rather than 'rule of law', this may be described as an example of arbitrary rule, and the point was appreciated at the time. There was considerable discomfort expressed about these provisions. For example, it was suggested that the existence of the original enabling 1939 Order in Council should be kept secret.[314] Indeed, the fact that the enabling instrument (which is passed by the Privy Council and does not require parliamentary approval or even scrutiny) was an Order in Council rather than a statute in 1939 says something about such unease.[315] This discomfiture clearly subsisted after the war, when the provisions were placed on a statutory basis. In a 1950 note by Arthur Creech Jones, the colonial secretary, clear reluctance is expressed about the propriety of introducing 'emergency powers':

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[307] Orders in Council are enacted as 'subordinate legislation' by the Privy Council, and therefore do not require Parliamentary scrutiny

[308] Emergency Powers Order in Council 1939 (9 March 1939); 2& 3 Geo 6 Ch 62 (1939) (UK)

[309] Regulation 6(2)e

[310] Regulation 6(2)b.1

[311] Regulation 6(2)d

[312] Regulation 6(2)g

[313] Regulation 7

[314] French, *British Way in Counterinsurgency*, p78

[315] This was a decision taken by Neville Chamberlain on the basis that such a Bill might not be passed in Parliament (see ibid., p71). As was seen above, it was only in 1945 that emergency powers were placed on a statutory basis

> I must emphasize the necessity of adhering as far as possible at which an emergency has to be declared, to the normal principles of English Law by which the rights and liberties of the individuals are maintained.[316]

In using these provisions, versions of which were brought into force in all Britain's counterinsurgency operations of the 1950s, it could easily be argued that any semblance to the 'rule of law' was thereby removed.

One of the founding documents of the idea of British counterinsurgency is *Defeating Communist Insurgency* by the former minister of defence of the Malay Federation during the 'Emergency' there.[317] In one of his often-quoted precepts of counterinsurgency, Thompson comments that 'The government must function in accordance with law', a point that touches on the central question within this thesis.[318] Thompson's views concerning the importance of adherence to the law and the consequences of failure to do so are very clear:

> If the government does not adhere to the law then it loses respect and fails to fulfil its contractual obligation to the people as a government. This leads to the situation in which officers and officials cease to be responsible for their actions, with the result that, instead of an insurgency, there is to all intents and purposes a civil war within the country in which neither side can claim to be the government. In such circumstances there is so little difference between the two sides that the people have no reason for choosing to support the government.[319]

This is a message which is at least as relevant today as it was in the 1950s. After his time as minister of defence in Malaya, Thompson spent some years in Vietnam as an advisor to the United States. He recalls:

> I remember saying to General Khanh, then Prime Minister to Vietnam, that when I heard of a case of a peasant suing the government for a buffalo killed by the army during operations and being paid compensation, we would be winning the war.[320]

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[316] A. Creech Jones, Note on Powers for Dealing with subversive activities, 18 February 1950 (TNA CAB 134.535/ODC (50) 14) (per French, *British Way in Counterinsurgency*, p78)
[317] Thompson, *Defeating Communist Insurgency*
[318] ibid., p52
[319] ibid., p50
[320] ibid., p55

Thompson is less insistent on the necessity for security forces to be accountable for their actions, but the point is made.[321] To what extent, though, was there real 'adherence to law' in the 'high period' of British counterinsurgency, which took place against the grand strategic background of withdrawal from an Empire of over 487 million people?[322] This period – and particularly the Malaya case – is chosen not primarily because it has provided something of a founding myth of contemporary counterinsurgent thinking,[323] but because the sources are relatively good and the historical background well known.

Rule of law in the Malayan Emergency

'We had got the fundamentals right. Maintain the administration, maintain the civil courts and adopt a strategy that would eventually defeat them ... we would have no military tribunals.'[324]

The 'Malayan Emergency', as it is still called, lasted from 1948, when the Malayan People's Liberation Army (MPLA)[325] began its insurgent campaign, until 1960, when it surrendered. It is often seen as a paradigm of counterinsurgent tactics; at the same time, others see it as a triumph of oppressive colonial techniques.[326] Such matters are largely beyond the remit of the current thesis. What is not in doubt is that it was a successful campaign at all levels, in that the insurgency was defeated and the initial strategic objectives achieved.

As the incidence of insurgent actions grew, an Emergency was declared in Malaya in 1948, and the Essential (Special Emergency) Regulations of 1948 were enacted (under the authority of a 1945 Act) by Governor Sir Edward Gent, conferring on the High Commissioner power to make his own regulations. These triggered the Federation of Malaya Emergency Regulations Ordinance 1948 and subsequent amendments.[327] It was under these that the security forces operated, and it was pursuant to them that those suspected of insurgent

[321] 'It helps to make all officers and civilian officials responsible and accountable for their actions.' ibid., p54
[322] Burleigh, Michael, *Small Wars Far Away* (Macmillan, 2012), p122

[323] David Kilcullen, among many others, ably debunks the realities of the counterinsurgent myth in 'The state of a controversial art'. For an example of another version of the Malaya campaign, see Hack, Karl, 'Everyone lived in fear: Malaya and the British way in counterinsurgency', *Small Wars and Insurgencies*, 23 (2012), 671–699
[324] Imperial War Museum Sound Archives, Interview with Sir Robert Thompson (IWMSA 10192)
[325] Formerly the Malayan Races Liberation Army
[326] Among many other recent authorities, see Benest, David, 'Aden to Northern Ireland', in Hew Strachan (ed.), *Big Wars and Small Wars* (Routledge, 2006), p. 18: 'coercion was the reality, hearts and minds the myth'
[327] *Mallials Digest of Malaysian and Singapore Case Law* (Malayan Law Journal Limited, 1969), p544

activities were tried. A key instrument of these provisions was administrative detention, the power to arrest and detain without trial.[328] By the end of 1948, there were certainly over 1,000 such detainees, and at least one author claims that there were several times that number.[329] By 1952, there were over 5,000.[330] When Gent was killed in an accident, he was replaced by Sir Henry Gurney, who arrived from Palestine, where he had been chief secretary to the government there.

Gurney rejected martial law, although the provisions that were adopted were similar in nature, including sequestration, control of movement, dispersal of assemblies, the designation of restricted areas, and the photographing of the entire population over the age of 12.[331] An offence of 'consorting' was introduced, the relevant law stating: 'Any person who consorts with any other person whom he knows or has cause to believe to be a person who intends or is about to act or who has acted in a manner prejudicial to the public safety or the maintenance of public order' thereby commits an offence.[332] Another tool available to the authorities was deportation,[333] sometimes following detention. By the end of 1948, 3,148 families had been deported to China. The figures are disputed, but the total figure deported over the course of the Emergency was certainly in excess of 14,000, with many more leaving under pressure, although not technically deported.[334] Once the communist government was securely installed in China at the end of the Civil War, deportation to China ceased, although other countries were used. The mass 'resettlement' programme under the Briggs Plan moved 650,000 people.

The regulations also permitted the use of detention as a mass punishment for communities suspected of colluding with the insurgents.[335] For example, when an official was murdered at a village called Permatang Tinggi in August 1952, 'General Templer personally told the

[328] Regulation 17 of January 1949. Under regulation 20, detainees could appeal to an advisory committee. Cf Simpson, A.W.B., 'Round up the usual suspects: the legacy of British colonialism and the European Convention on Human Rights', *Loyola Law Review*, 41:4 (1995–96), pp629–711

[329] ibid., fn192
[330] *Singapore Free Press*, '5081 held under the Emergency', 1 August 1952

[331] Simpson, 'Round up the usual suspects', p660
[332] Regulation 5
[333] Regulation 17 c
[334] Simpson, 'Round up the usual suspects', p661
[335] Regulation 17D of January 1949

villagers that they would be detained if the murderer was not detained within 4 days. When no information was forthcoming all 64 villagers were detained and the village was destroyed.'[336] Other forms of collective punishment permitted included confinement of inhabitants of particular villages, closure of shops or schools, and reduction of the rice ration.[337] The powers to authorise collective punishment and mass detention were ended in September 1953, with Templer being evidently less keen on their imposition than his predecessor.[338]

On 31 December 1955, by which time the back of the insurgency had been broken, these regulations lapsed and were replaced by the Preservation of Security Ordinances. Anyone convicted under these could apply to the Court of Appeal.[339]

The drafting and passing of laws and ordinances are one matter. Of equal – or indeed greater – importance was how those regulations were implemented. To what extent was 'rule of law' implemented in Malaya, as mandated by the strategic approach selected?

One way of assessing this is to examine the key primary texts on cases brought to appeal – the contemporary law reports. The Malayan colonial courts (and indeed courts in today's Malaysia) followed procedure almost identical to that of English courts. During the colonial period, all appellate judges were English. In theory, and as seen below, occasionally in practice, courts of the Malay Federation were subject to appeal to the Privy Council in London, the final court of appeal for the colonies, composed of senior judges of the House of Lords. It is clear from the available judgments that the professional standards prevalent at the time in terms of the quality of legal analysis were maintained.

The judicial role

Some 55 cases heard between 1948 and 1960 and reported in the Malayan law reports[340] or in the *Malaya Law Journal* are concerned with the Emergency Regulations. All of them are cases brought on appeal, usually from the trial courts on points of law. In most of them, the

[336] Simpson, 'Round up the usual suspects', p658
[337] Regulation 17DA
[338] Simpson, 'Round up the usual suspects', p663, citing *Straits Times*, 8 December 1953
[339] The state of emergency ended on 29 July 1960 by proclamation under article 163 of the Constitution of the Federation of Malaya. The colonial emergency regulations were repealed by the Internal Security Act 1960

[340] A digest of which is available at leading law libraries

issues before the court related to the admissibility of various forms of evidence or the adequacy of the judge's summing up to the 'assessors' (cases under Emergency Regulation were tried by assessors, not juries). Some concerned questions put by trial judges on certain matters, to provide clarification. For example, in one case the judge asked the Court of Appeal whether he was obliged to impose penal servitude *and* whipping.[341] Another case involved consideration of whether rayon was a restricted article and could be removed from a 'restricted area'.[342] No fewer than 25 of the 55 reported 'security cases' resulted in judgments favourable to the appellant. A flavour of the cases may be obtained from the selection below.

Public Prosecutor v *Chan and Others*: Weapons were found in a fisherman's hut and all inside the hut were charged. The court decided that the prosecution had to prove knowledge of the presence of firearms, and the appeal was allowed, so the men could go free.[343]

Leong v *Public Prosecutor*: A police officer was used as an interpreter when a confession was taken from the accused. The defence challenged the confession as inadmissible. The same policeman also gave evidence in the subsequent trial in relation to the material of the offence, which was possession of a firearm. This 'offended against the elementary ideas of justice and therefore no reliance could be placed upon the accuracy of that statement [the confession]'.[344]

Sambasivam v *The Public Prosecutor*: This case concerned a man sentenced to death under the Emergency Regulations for possession of a weapon. The appeal concerned whether there had been a procedural error in the appeals procedure.[345] The appeal was allowed and the sentence was quashed. By way of comment, this was the kind of case that was decided on what might be termed a 'legal technicality'. It concerned the admission of a statement

[341] *Malayan Law Journal* (hereafter *MLJ*), 1949, p236. Whipping was not, the judgment said, mandatory
[342] Under regulation 17 EA 5. See *Public Prosecutor* v *Louis MLJ* [1955] 220. The court declared that rayon was restricted
[343] Malayan Law Reports [hereafter MLR] [1949] 96
[344] *MLJ* [1948–49 suppl] 56, heard by the Court of Appeal of the Malay Federation
[345] Regulation 4(1), concerning possession of a weapon, for which the mandatory sentence was death. The initial conviction was handed down in March 1949. Regulation 4(1) was the provision under which most death sentences were imposed

made by the defendant in relation to one charge, of which the appellant was acquitted in order to prove another.[346]

Si Ah Fatt v *Public Prosecutor*: The appellant had been found in the company of a man who was in possession of a Mauser pistol. He was initially convicted and sentenced to five years in prison.[347] His appeal was allowed and the sentence quashed, as the prosecution needed to prove that the appellant knew that his companion had the weapon.[348]

Soo, Lai and Chan v *Public Prosecutor*: The appellants were convicted of consorting with 'bandits'[349] and sentenced to five years' 'rigorous imprisonment'. The appeal turned on the construction of the word 'consorting'. The appeal was partially allowed and a sentence of two years was substituted.[350]

Public Prosecutor v *Peong*: Sixteen men were playing cards in a home not their own. The case turned on whether the curfew imposed under regulation 7, which stated that people had to 'remain within doors' meant that a person needed to be in his own home. The court decided that it simply meant inside, and the appeal was allowed.[351]

Ngee v *Public Prosecutor*: The Malayan Court of Appeal decided that a right of appeal against sentence existed even where the only sentence available was death – in this case, for possession of a hand grenade and six rounds of ammunition. The sentence was confirmed, although the right to appeal was upheld.[352]

Periannan and Others v *Public Prosecutor*: Another curfew case, in which a fine was reduced from $75 to $30. The main issue here was whether magistrates had the authority to try cases under the Emergency Regulations. They did.[353]

There is little or no sense in these cases of a judiciary in thrall to the executive. On the contrary, there are very many decisions which would have disconcerted the security forces.

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[346] MLR [1950], vol 1, p128. The case was heard before the Privy Council
[347] Under regulation 5(1) 'being in the company of another person who is carrying weapons or explosives ...' This also carried the death penalty, but here it was discretionary
[348] MLR [1950], vol 1, p138 (Case heard before the Federation of Malaya Court of Appeal)
[349] Under Regulation 6(a)(1)
[350] MLR [1951], p122 (A reference to the Federation of Malaya Appeal Court)
[351] MLR [1951], p132
[352] MLR [1952], p16 (Federation of Malaya Court of Appeal)
[353] MLR [1953], p142 (Federation of Malaya High Court)

One of the more interesting took place in 1952, during the most intense phase of the Emergency. Two police officers, one British and the other Malay, arrested a man whom they suspected of involvement with 'bandits'. They took him aside, on his evidence, and threatened and hit him. He was prodded with a pistol and a shot was fired near his head. A confession was obtained. The 'bandit' was acquitted on the basis that he had been forced into a confession, complained, and eventually the two officers were convicted of assault. The British officer was given a month's imprisonment with hard labour, and his subordinate seven days. The Malayan officer was told that it was his duty 'to say that this was a thing we cannot do. The only way to make the law known is to enforce it'.[354] David French, in other areas highly critical of British colonial practices, is clear on this: 'Securing a conviction even of an insurgent caught under arms was far from straightforward. The security forces had to follow proper procedures.'[355] He seems to have been right.

Furthermore, the briefest of looks at both the journal and the law reports shows that in Malaya during the time of the Emergency, normal legal life proceeded much as it would have done otherwise. Over 98 per cent of judgments[356] concern other matters, of the kind any volume of contemporary law reports would. Road traffic cases, sales of land, landlord and tenant, ordinary crimes, contract and tort cases. More cases were reported on appeal concerning gambling than 'Emergency Legislation'.[357] This is significant. There is the sense, when reading these digests, cases and articles, that legal and business life proceeded reasonably normally. One reason for this may have been that the fighting was taking place mostly outside the cities, where of course most of the commerce was going on. However, it is also clear that litigants, many of whom (judging by their names) were Chinese, were confident that not only might they get a hearing and judgment, but that such a judgment might be enforced.

The same was, or appears to have been, true in Cyprus. Cyprus, like Malaya and Kenya, has a fully common law system of justice. This implies that when disputes – whether criminal or

[354] *MLJ* [1952], vol 18, p43
[355] French, *British Way in Counterinsurgency*, p88
[356] Seventy-nine cases out of 9,923 in the four volumes of the standard work, *Mallials Digest of Malaysian and Singapore Case Law*, covering the period 1949–1967, deal with matters connected to the 'Emergency'. These include cases relating to the Indonesian Confrontation. Of those 79, as seen in the main text, only 55 concerned the period 1948–1960
[357] Some 165 cases reported in the Digest in the period 1948–1967 deal with the law related to gambling

civil – are appealed, the reasoning and results are reported. An examination of the relevant law reports in Cyprus for the period 1948–60 reveals a picture of apparent legal normality.[358] From the perspective of jurisprudence, life seems to have continued very much as it had done before and has done since. Very few cases which went to the Cyprus Court of Appeal and were reported in the law reports concerned the Emergency. Indeed, there appears to have been only one that related directly to insurgent military action. This was a case relating to an alleged member of EOKA, the Cypriot nationalist insurgent group, Ekaterina Soteriou, who went by the *nom de guerre* 'Nina'.[359] Her sentence for possession of explosives was reduced from twelve years to nine, on the basis that 'Nina' may have been married (there was no direct evidence of this, and 'Nina' did not appear to assert this) and therefore 'may have acted under the influence of her husband'.[360]

Legal rhetoric?

To a very great extent, however, the picture that may be formed of an executive restrained, in the context of the security situation, by an apparently largely impartial judiciary may be a false one. Simpson points out in his authoritative article on the European Convention on Human Rights in British colonial law that:

> The protection of individual rights rested largely on such discipline and self-control as the security forces were able to maintain. *The power of individuals to challenge them was minimal*.[361]

In theory, under regulation 20, a detainee could appeal to an advisory committee. The identity of the members of this committee was secret. Simpson quotes the complaints of a lawyer and member of the Malayan Legislative Council R. Ramani:

> He, [the detainee] is supposed to state the grounds of his objection without knowing a word about why he has been detained; and then what happens? This notice goes to the Advisory Committee and then the Advisory Committee writes to

[358] Cyprus Law Reports (volumes 1948–1956 and 1957–1960)
[359] Cyprus Law Reports (1958), p246
[360] ibid., p248
[361] Simpson, 'Round up the usual suspects', p663 (my italics)

> him in another printed form. They don't even then, tell him the grounds of his detention. They tell him his application will be heard on such and such a date ... and then go on to say sapiently these words 'the grounds for making a detention order against you was that you were suspected of having recently acted or – mark these words – of being likely to act in a manner prejudicial to the public safety or good order'.[362]

This is more reminiscent of Kafka than the Judicial Committee of the House of Lords. Checks on the actions of the security forces seem in practice to have been rare.

The secretary of state for defence of the Malay Federation for much of the time of the Emergency was Sir Robert Thompson. His book *Defeating Communist Insurgency* has proved influential in much subsequent thought on counterinsurgency, with its focus on civil measures. Thompson acknowledges that 'some very tough laws were enacted in Malaya'.[363] There was a clear awareness in the community at large that 'administrative detention' (internment) was 'necessary for the defence of the state'; however, there was an equal awareness that the state needed to be reined in, or be seen to be reined in, if those powers were used excessively – and indeed concerns were expressed in the press that 'in a small number of cases, the procedure by which a detainee has been given the opportunity of objecting to the order of detention is unsatisfactory'.[364] Incidentally, it is instructive as to the culture predominating in Malaya at the time that matters like this are discussed in much the same way as they are today. Information was widely and freely available to the political nation through what appears to have been a free and vibrant press.[365] There was clearly also a consciousness among the judiciary that the rule of law, as understood by them, was under some strain and that there was a need to be seen to act in accordance with it. When Mr Justice Mathew was sworn in as the Federation of Malaya's new chief justice in January 1952, the attorney general in his public welcome speech said 'not only does it fall to yourself and your colleagues to administer in this time of emergency laws of some severity, but it

[362] ibid., p664, quoting Short, Anthony, *The Communist Insurrection in Malaya 1948–1960* (Frederick Muller, 1975)
[363] Thompson, *Defeating Communist Insurgency*, p53
[364] *Singapore Straits Times*, editorial, 17 January 1953
[365] For example, on the number of detainees, *Singapore Free Press*, '5081 held under the Emergency', 1 August 1952

falls to you to administer them with absolute justice, but with a ready humanity in accordance with the highest traditions of British justice'.[366] To some extent this was rhetorical flourish. However, it is clear that there was some unease at that time as to the derogations being made from traditional values of human rights.[367]

It is clear that in traditional British counterinsurgency doctrine there is a clear link between the idea of legitimacy and the 'hearts and minds' narrative – a term now largely defunct,[368] but certainly a key part of the narrative in Malaya at the time, notwithstanding the fact that it may have been honoured sometimes more in the telling than in the doing.[369]

It could be argued that, from the perspective of the suspect, what the British called the regime under which one was interned – martial law or otherwise – was of little relevance. Rather more important was the fact that one's internment was not subject to independent review or de facto accountability (traditionally called 'habeas corpus') and was based upon an administrative decision rather than a decision in a court. It is clear that the degree to which a detainee had access to judicial review of detention, was in fact rather limited. At least there was a semblance of judicial process, perhaps even sufficient to pass the threshold of 'legitimacy'. This was certainly the case in the political nation, insofar as the narrative related by the contemporary law reports (and indeed the press) tended to support the idea that the security forces were indeed accountable within the law. This is part of what General Rupert Smith calls part of the 'theatre' which, he says, is constituted by contemporary military operations (see Chapter 1).

As argued in Chapter 1, 'optics' are important, and in Malaya at least some attention was given to appearances, to that legal 'theatre'. This was certainly not the case elsewhere.

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[366] *Singapore Straits Times*, 'Reds want to wipe out Rule of law; Judge told to keep light burning', 15 January 1952

[367] See also letter from SMK, *Singapore Straits Times*, 9 September 1952: 'I hope ...British Law will once again be purified by giving every detainee a fair trial without any further delay'

[368] See, for example, Mockaitis, 'Minimum force debate'. At p777, Mockaitis says that 'I have come to loathe the phrase "hearts and minds"'

[369] See contemporary Malayan press reports, where it was common, even in relation to matters other than the Emergency. See, for example, *Singapore Straits Times*, 'Winning the hearts and minds of a people', 12 February 1953 concerning Mrs Templer's work in the colony

Rule of law during the Kenya Emergency

'There is a very strong temptation in dealing both with terrorism and with guerrilla actions for government forces to act outside the law.'[370]

In Kenya there was no political strategy such as there had been in Malaya, nor any realistic appreciation that the end of colonial rule was a matter of years rather than of decades. As Elkins points out, 'the timing for Britain's future decolonisation of Kenya was vague at best'.[371] This had an opposite effect to the one that the presence of a political strategy had in Malaya, with its intimations of political legitimacy.

The counterinsurgency operations in the British colony of Kenya ran almost exactly concurrently with the campaign in Malaya. In Kenya, a combination of conflict over land and tribal rivalry had given rise to an organisation called 'Mau Mau', which was dominated by the Kikuyu tribal group. The Mau Mau conducted a campaign against British colonial security forces from 1948 to 1960.[372]

While some measures were adapted from Malaya, thanks to the occasional transfer of colonial security officials, there was very little systemic consistency between the two theatres.

The case of the Kapenguria Six – Jomo Kenyatta and five other Kenyan nationalist leaders, allegedly for involvement in Mau Mau activities – set the tone, although even in its manifest derogations from any standards of fair trial accepted then or now, it was far better than what was to come later. In order to placate anti-colonial feelings in the UK, a trial was ordered by Governor Evelyn Baring, despite the powers he had to order administrative detention.[373] Nonetheless, this was not to be a fair trial. Obstacles were placed in the way of a highly skilled defence, and the judge was 'biased and vindictive'.[374] Witnesses were suborned and bribed, and there was constant contact between the judge, who had been awarded a vast pension when he took the case (essentially a bribe),[375] and the governor.

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[370] Thompson, *Defeating Communist Insurgency*, p52
[371] Elkins, Caroline, *Britain's Gulag: The brutal end of empire in Kenya* (Pimlico, 2005), p60

[372] Although a State of Emergency was only declared in October 1952 by Governor Baring
[373] Elkins, *Britain's Gulag*, p40
[374] Burleigh, *Small Wars Far Away*, p375
[375] Elkins, *Britain's Gulag*, p40

The atmosphere was not assisted by the infamous murder of the settler family of Roger, Esme and Michael Ruck by Mau Mau activists while the trial was proceeding. Kenyatta and his fellow accused were convicted of managing a proscribed group and sentenced to seven years' hard labour.

Emergency assize courts were set up,[376] and the kind of processes rejected by Briggs in Malaya as 'largely the result of panic and emotion'[377] – namely the introduction of summary trials followed by execution – were adopted in Kenya.

One settler wrote to a newspaper in Kenya at the time: 'It is stark nonsense to treat these rebels as legitimate belligerents and to apply to them the subtleties and intricacies of British law.'[378] David French makes the point that, whereas in normal times in Kenya, about half of all death sentences were commuted, during the Mau Mau Emergency of the 1,468 death sentences, 1,048 were carried out.[379] The proceedings were little more than show trials: 'due process was suspended, the defense had little if any access to the evidence in the case and the defendants themselves were often tried en masse and identified for the court not by name but by large numbers hanging around their necks'.[380] The number of executions in Malaya was 226 – still a large number, and higher, for example, than the official number (as opposed to extrajudicial killings) carried out in Algeria by the French authorities. One reason for the far smaller number of executions in Malaya was that prisoners were regarded as better sources of intelligence than corpses – more a question of pragmatism than any attachment to the value of human life.

David Anderson has written the leading work on the operation of courts in Kenya during the Kenyan Emergency. His findings, which have provided much of the material for recent leading court cases,[381] might be summarised as follows:

> The war against Mau Mau was fought not just by the military or by the police, but by the civil administration in a pervasive campaign that sought to strip the rebels and

[376] Under the Emergency Powers Order in Council 1939
[377] French, *British Way in Counterinsurgency*, p93
[378] Dunn, Cyril, 'Justice in Kenya', *Observer*, 12 December 1954, quoted by Elkins, *Britain's Gulag*, p88
[379] French, *British Way in Counterinsurgency*, p93
[380] Elkins, *Britain's Gulag*, p89
[381] See *Mutua* v *Foreign and Commonwealth Office* available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/mutua-fco-judgment-05102012.pdf

> their sympathisers of every possible human right, while at the same time maintaining the appearance of accountability, transparency and justice. Nowhere was this more apparent than the Mau Mau trials.[382]

Law reports in Kenya 1948–60

As in Malaya, the sense in the contemporary law reports is of a comfortable legal system carrying on very much as usual. For example, only three cases in the reports for the years 1953-56 explicitly deal with matters concerned with the 'Emergency'. These dealt with the evidence needed to corroborate a charge of membership of an 'illegal society' (Mau Mau),[383] the requirement for precision in charging,[384] and the ever-common (in normal circumstances) problem of identification.[385] All of these were reported in 1953. The years 1954–56 see no cases reported at all concerning the Emergency.

There was not a universal sense of complacency concerning the way the law was being used. Anderson quotes one judge speaking of the system of 'screening':

> Such methods are the negation of the rule of law which it is the duty of courts to uphold and where instances come before the courts of allegations that prisoners have been subjected to unlawful criminal violence, it is the duty of such courts to insist on the fullest inquiry with a view to their verification or refutation.[386]

In another case referred to by Anderson, the Appeal Court Judges Worley, Jenkinson and Briggs 'seized the opportunity offered to mount a savage attack upon the security forces in general and the police in particular'.[387] The judges in this case, which involved the highly emotive (within the white settler community) murder of two settlers, took the view that

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[382] Anderson, David, *Histories of the Hanged: Britain's dirty war in Kenya and the end of empire* (Phoenix, 2006), p6

[383] *Njeroge* v *R*; Kenya Law Reports 1953 (Vol XXVI), p98

[384] *Kariuki* v *R*; Kenya Law Reports 1953(Vol XXVI), p97

[385] *Muiga* v *R*; Kenya Law Reports 1953 (Vol XXVI), p100

[386] Quoted in expert evidence given by David Anderson to the court in Mutua and Others, para 126. He is quoting a judge of the East African Court of Appeals reported in *The Times* of 24 December 1954. Earl Jowitt also quotes the judgment in a debate in the House of Lords, 'The Situation in Kenya', on 10 February 1955 (see *Hansard*'s report of that debate, available at http://hansard.millbanksystems.com/lords/1955/feb/10/the-situation-in-kenya)

[387] Anderson, *Histories of the Hanged*, p115

> the implications of this case are indeed grave, suggesting as they do that the police force in Kenya is tending to become a law unto itself. The courts will fail in their duty if they ignore or pretend not to see the danger when it is apparent on the evidence before them.[388]

Nonetheless, very few such cases came effectively to appeal. For that to have happened, there needed to be lawyers willing (and indeed present) to conduct them. Few such lawyers were available, and what now might be called 'access to justice' was poor at best. In any event, Anderson asserts that the recommendations in a report by a senior judge following judgments in cases such as this (the 'Holmes Report') were suppressed by Baring and the executive.[389]

Strategy, narrative and legal legacies

There were very great differences between the two campaigns. In Malaya, there was a clear strategy that evolved from well-defined political directives. At the outset of his time in Malaya, the High Commissioner General Gerald Templer made it abundantly clear that he required guidance from government, specifically Winston Churchill (the prime minister of the day), as to exactly what the strategic objective was: ' I am not at all clear as to what [HM Government] is aiming at from the political point of view ... I must have a clear policy to work on.'[390]

Templer received a detailed and clear reply in the terms he had requested, outlining the policy of the government for the development of a Malay nation, with full citizenship, 'partnership' and democracy for all its races.[391] This required the defeat of communist 'terrorism' and a 'worthy and continuing British involvement in the life of the country'. This constitutes what would now be called a 'desired end-state'. The commitment to independence bled any form of legitimacy from the Malayan Races Liberation Army, beyond

[388] Criminal Cases 549-552/1954, 19 August 1954, quoted in ibid., p116
[389] See Mutua and Others, para 127 and Anderson, *Histories of the Hanged*, p306
[390] Minute by Sir G. Templer to Mr Churchill PREM 11/639. From HMSO, *British Documents on the End of Empire*, Volume 2 (HMSO, 1995), p361
[391] The reply outlined the policy of the government for the development of a Malay nation, with full citizenship, 'partnership' and democracy for all its races. This required the defeat of communist 'terrorism' and a 'worthy and continuing British involvement in the life of the country'. This constitutes what would now be called a 'desired end-state': Directive issued by Mr Lyttleton on behalf of HMG PREM 11/639. From HMSO, *British Documents on the End of Empire*, p372

its appeal to those of a Marxist inclination. At an early stage in the campaign there was a strong insistence that 'the civil courts functioned ... although we were of course at the time introducing all the emergency regulations and so on, most of which were very tough ... all crimes would go through the civil courts.'[392]

The framework within which these courts operated is of crucial importance, as it marks the difference between what were essentially formally 'civil' courts and courts that in fact operated as arms of the security forces. This is of far more than conceptual or theoretical importance, as it plays into legitimacy.

'Legal' is not necessarily congruent with 'legitimate', and indeed the criticism was made at the time (and has been made since) that by rendering oppressive and essentially unconstitutional actions legal, the British were 'taking a leaf out of the Nazi book', as David French suggests.[393] As drafted (although, in fairness, not always as executed in practice), the Order in Council amounted to the licensing of arbitrary and summary rule by a governor in a colony. This was 'rule of law' only in its most narrow and confined sense.

The fact that, as David French points out, the British very much tended towards security and away from basic human rights is painful for those, such as Thompson, who stress the need for counterinsurgency to remain within legal boundaries. The truth is that there is no doubt whatsoever that had the methods employed by the British in Malaya or Kenya been employed in Europe at any point over the past 60 years, they would be characterised as deeply oppressive (at the very least), howsoever backed up by 'legislative' provisions. Indeed, in more recent years the 'enormous resettlement programme' in Malaya would be labelled simply 'ethnic cleansing', as would the activities authorised under emergency powers in Kenya.

As French asks, 'if it is legal, was it also legitimate?'[394] This distinction between legal and legitimate is a trope that plays out in many (or perhaps even most) insurgencies. Despite the relatively liberal approach in Malaya (relative to Kenya), the fact remains that the use of 'emergency powers' amounted to a gap between the British rhetoric (of remaining under

[392] Interview with Robert Thompson; Imperial War Museum Sound Archive (IMSA 10192)
[393] French, *British Way in Counterinsurgency*, p81
[394] ibid., p82

the 'rule of law') and the reality, which was far more than, as Strachan has put it, 'the firm smack of government'.[395] In terms of rule of law, it is instructive that the UK entered what are termed 'reservations' to relevant human rights instruments, specifically the Geneva Convention article 68, forbidding the execution of civilians by military courts. Indeed the 1949 Geneva Conventions were not ratified by the UK until 1957.[396]

Recognition of, and obedience to, law – the nearest approximation to the practical demonstration of loyalty (as we saw from the writings of Tyler in Chapter 2) – derives at least in part from the willingness of those people subject to a law to see that law and its enforcement as legitimate, rather than from their fear of what the law might do to them if they transgress. Enforced compliance is always possible, as several oppressive regimes have shown, even in insurgencies.[397] But this is not legitimacy, and is arguably, in any event, not sustainable.

The various wars fought by the British against different resisting peoples have left a legacy, often of bitterness. This has certainly been the case in Kenya, where legal actions are still being taken by hundreds of Kenyans – very publicly and to the continuing embarrassment of the British government, which has spent a great deal of time and money trying to suppress the records of misdoings.[398] Only one such case has been brought in Malaya, concerning the alleged massacre of rubber plantation workers by a unit of the British Army at Batang Kali in 1948.[399] The Batang Kali incident has carried forward to the twenty-first century, and at the time of writing shows no sign of going away.[400]

In neither Malaya nor Kenya were the insurgencies the British faced sufficiently developed, and nor were those insurgencies allowed to develop sufficiently to put into operation their

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[395] Strachan, 'British Counterinsurgency from Malaya to Iraq', pp8–11

[396] ibid.

[397] Russia in Chechnya being a signal example

[398] See *Mutua* v *Foreign and Commonwealth Office*, available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/mutua-fco-judgment-05102012.pdf

[399] BBC, 'Malaysians lose fight for 1948 "massacre" enquiry', BBC Online, 4 September 2012, available at http://www.bbc.co.uk/news/world-19473258 See also Ward, Ian and Miraflow, Norma, *Slaughter and Deception at Batang Kali* (Media Masters, Singapore, 2009)

[400] See *Keyu and others* v *Secretary of State for Foreign and Commonwealth Affairs* (UK Court of Appeal judgment dated 17 March 2014), available at http://www.judiciary.gov.uk/media/judgments/2014/keyu-and-others-v-foreign-secretary

own competing systems of justice to challenge for legitimacy. In neither place did the British courts face any competition as working dispute resolution systems acting within a political sphere. There were no MPLA courts acting as accepted arbiters of civil or criminal disputes, or at least there is no record of such courts. The same applies in Kenya. In both cases, the military campaign was against guerrillas who enjoyed no outside support, had little training and found themselves challenged by comparatively well-developed military systems and very hard pressed. In neither theatre was there space for an alternative or shadow government to grow and establish an alternative source of legitimacy. In Malaya, the foundations laid by the British colonial administration have provided the basis for Malaysian legal approaches: 'In many ways, the 1948–60 Emergency set the pattern not only for the conduct of future Emergencies but even in some respects for what became regular laws.'[401] This was as true in Palestine and its successor state, Israel, as it was in Malaya.[402]

The 'Diplock Courts'

The insurgencies of the 1950s were part of a general retreat from Empire for all European colonial powers, including Britain. Far closer to home, another conflict, more ancient in character, had flared up again, with a civil rights movement in Northern Ireland being co-opted by insurgent groups, as a result of a combination of opportunism by those groups and serious misjudgements on the part of the British government.

By 1972, the political and military situation in Northern Ireland had deteriorated to such an extent that direct control from London was imposed on Northern Ireland. Previously, the province had been governed by a government in Belfast that the predominantly Catholic minority Nationalist community regarded as sectarian. One of the first tasks of the new government was to reassess the effectiveness of the courts system. The highly controversial system of 'internment' had been introduced to offset the difficulties caused by gaining credible witness testimony. Accordingly, a commission headed by a leading judge, William

[401] Harding, Andrew, *Law, Government and the Constitution in Malaysia* (Kluwer Law International, 1996), p153

[402] In 1948, very shortly after independence, the Israeli Parliament (the Knesset) allowed for a state of emergency to be promulgated. In due course an emergency was declared on 21 May. These provisions have essentially survived in terms of their effect virtually untouched until 1979 with the passage of the Emergency Powers (Detention) Law. The idea of 'emergency' very much remains current

Diplock, concluded that for certain 'scheduled offences' (connected with terrorism) the right to jury trial would be abolished.[403] Diplock summarised the risks as follows:

> The main obstacle to dealing effectively with terrorist crime in the regular courts of justice is intimidation by terrorist organisations of those persons who would be able to give evidence for the prosecution if they dared.[404]

Due to the clear risks of intimidation of jury members within a highly charged political and military environment,[405] it was 'therefore necessary to consider whether any changes can be made in criminal procedure which, while not conflicting with the requirements of a judicial process, would enable at least some cases at present dealt with by detention to be heard in courts of law'.[406] Certain 'scheduled offences should be [tried] by a Judge of the High Court, or a County Court Judge, sitting alone with no jury, with the usual rights of appeal'.[407]

Criticism of the new courts began as soon as the first announcement of the conclusions of the Diplock Commission.[408] To some extent, the establishment of the courts played into the hands of the insurgent Irish Republican Army (IRA), and this was almost inevitable.. The human rights implications of having state-appointed judges as deciders of fact were clear, and human rights organisations were equally clear in their condemnation.[409]

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[403] Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland, 1972, Cmnd 5185; better known as the 'Diplock Commission'. See http://cain.ulster.ac.uk/hmso/diplock.htm for summary of conclusions

[404] Diplock Commission report para 7 7(a)

[405] The courts were, in due course, established by the Northern Ireland (Emergency Provisions) Act 1973. This was supported and continued by the Prevention of Terrorism (Temporary Provisions) Act 1974. The ancestor of this Act was a 1939 statute The Prevention of Violence (Temporary Provisions) Act, similar in effect to the Emergency Powers Order in Council 1939 (see above)

[406] Diplock Commission report para 1(e)

[407] Diplock Commission report para 1(g)

[408] See *Hansard*, 20 December 1972, available at http://hansard.millbanksystems.com/commons/1972/dec/20/diplock-commission-report

[409] See, for example, Korff, Douwe, 'Diplock Courts in Northern Ireland: A fair trial?' (Amnesty International, 1984), available at http://amnesty.org/en/library/asset/EUR45/004/1983/en/070b71c5-47c3-4ffd-add8-6108adb415b7/eur450041983en.pdf

Though it is not at all clear what alternatives the British (or indeed Lord Diplock) had to establishing such courts, short of internment, from the strategic perspective the courts played well in the context of the IRA's 'Long War' strategy.[410] This aimed at making the province ungovernable except by what the IRA called 'Colonial Military Rule'. Clearly the way was open for the IRA and its supporters, highly capable strategic communications operators, to make the claim that the Diplock Courts were essentially a quasi-colonial imposition; in so doing, of course, they denied the legitimacy of the Diplock Courts. To that extent, the IRA operated the 'rupture strategy' initially advocated by Jacques Verges in Algeria (examined in more detail below). In due course, the courts became a key stake in negotiations to end the conflict, and they were abolished in July 2007.[411]

In some ways, the Diplock Courts were 'cousins' of the courts of the various British counterinsurgency campaigns of the 1950s. They decided cases under what amounted to emergency regulations, although they themselves were not emergency tribunals as such (still less military tribunals). Arms of the state in one sense, they were to some extent instruments for 'the disposal of unwanted members of the public', as Kitson would have it (see above). In one sense, that is the function of all criminal courts. The issue here is not one of function, but rather one of fairness.

There is no doubt that the courts played an essential role in providing some oversight for the activities of the security forces (as did the courts in Malaya), since there were very many acquittals. Criticisms of the Diplock Courts equate lack of a jury to lack of fairness. But it is worth observing that most legal systems in the world function without juries, and often in a way that is accepted as 'fair' by many of those subject to their jurisdiction. There is evidence that in effect, if not in form, the Diplock Courts were essentially a hybrid of the adversarial (in that there were prosecution and defence lawyers playing highly active roles in the proceedings) and the inquisitorial (where the judge takes the leading role – the so-called 'civil' or 'continental' system).[412] As in those civil systems, judges took a very active part in

[410] Provisional IRA 'Green Book', p8, available at http://tensmiths.files.wordpress.com/2012/08/15914572-ira-green-book-volumes-1-and-2.pdf
[411] Justice and Security (Northern Ireland) Act 2007
[412] See Jackson, John and Doran, Sean, , 'Conventional trials in unconventional times; the Diplock Court experience', *Criminal Law Forum*, 4:3 (1993), p503

proceedings. It is also fair to say that there are few allegations from independent critics to be found of bias on the part of judges in such trials.

Whether or not the Diplock Courts did in fact offer due process and fair trials is of secondary importance. The problem they created was not necessarily that they were unfair, but that they were *perceived* to be unfair. As we saw in Chapter 1, there is considerable evidence to suggest that it is the perception of fairness that supports legitimacy, and that perception is itself fed by, and in turn feeds, a wider narrative.

Section 2

Litigation lawfare in incumbent courts

Rupture strategy

We turn now to how those acting against the interests of the 'incumbent' might use courts to their advantage. In situations of insurgency, insurgents before courts often challenge the very right of their accusers to try them. The most famous incident of this kind took place in 1649. The English Civil War was over, and the leader of one of the parties to that war (fought to a very great extent over the issue of the source of legitimacy – Parliament or King), King Charles I, was indicted and tried for the crime of High Treason. He answered the indictment as follows:

> Now I would know by what authority, I mean lawful, there are many unlawful authorities in the world, thieves and robbers by the highways, but I would know by what authority I was brought from thence, and carried from place to place, and I know not what: and when I know by what lawful authority I shall answer [the charge].[413]

At this point, of course, the former head of state was no longer in a position of active authority, but he claimed such authority. He was, it could be said, at the point of his trial himself an insurgent.

[413] Quoted from Robertson, Geoffrey, *The Tyranicide Brief* (Vintage, 2010), p156

The well-known French lawyer Jacques Verges called this the 'rupture defence': he adopted the denial – the defensive – and then, he might claim, took it a step further by adding an 'offensive' element:

> ... so that when the judge says 'You're French', the prisoner says 'I'm Algerian'; the judge says 'You're in a criminal conspiracy', the prisoner says 'I'm in the resistance'; the judge says 'You committed murder', he says 'I executed a traitor'. From then on no dialogue is possible.[414]

Verges developed this form of 'lawfare' in Algeria in the late 1950s, when he earned a reputation for uncompromising criminal defence of men and women suspected of involvement in attacks on French interests, including terrorist attacks. He encapsulated his approach in his book *De La Stratégie Judiciaire.*[415] A curiously under-referenced book, at least in English-language discourse, it sets out a way in which insurgents use courts against the established order. Verges himself, who died in 2013, was a radical lawyer, well known (and indeed famous in France) for his support of causes highly unpopular in the West, such as Palestinian guerrillas and the Khmer Rouge, as well as Nazis indicted in France for war crimes committed in the Second World War.

De La Stratégie Judiciaire is a review, with historical and modern examples of techniques that can be used in court by insurgents. The author writes that: 'In terms of political (legal) defence, there are always two methods. The compliant strategy (Dreyfus, Challe) or the "rupture strategy" (Socrates, Jesus). The first endeavour to save their lives; the second to win their cause. The novelty of today is that they can also save their lives.'[416] The idea was based on the astute observation that 'by nature, the prosecution is conservative'.[417]

Irish insurgents combined both approaches when it suited them. 'When the defendants were brought before the court, they refused to recognise it, stating that they were soldiers of the Irish Republic and denied the right of a foreign tribunal to try them.'[418] As was discussed above, they then took to the offensive in the very courts whose jurisdiction they

[414] Verges, Jacques, *Terror's Advocate* (DVD directed by Barbet Shroeder, 2010) at minute 20
[415] Verges, *De la Strategie Judiciare*
[416] ibid., introduction
[417] ibid., p94
[418] Foxton, *Sinn Fein and Crown Courts*, p174

denied. The same approach was taken by IRA prisoners in the 'troubles' of the late twentieth century. At least one judge at that time took the view that Mr Justice McGonigal, a judge in the Diplock Courts, 'would show grudging respect for those IRA men who refused to recognise his court, regarding them as behaving like proper soldiers'.[419]

Skilfully done, it makes the courtroom part of the battlefield. Verges' first major case illustrates this. In his classic Bouhired trial, Verges turned attention away from the facts of the case and instead towards the legitimacy of the court and, by extension, the legitimacy of the state. Djamila Bouhired was accused of planting a bomb in a cafe in the European quarter of Algiers in 1956 which killed 11 civilians (an event depicted in the film *Battle of Algiers*). In 1957, she had been captured and allegedly tortured; in July 1957 she went to trial for murder. She was defended by Jacques Verges. The usual defence strategy in such a case might be to attempt to undermine the prosecution case by challenging the integrity of the evidence, the intelligence upon which it was based or the conclusions of the forensic experts. If there was a confession, that too might be challenged (in Bouhired's case there was no confession). Alternatively, it might be open – in the event that the prosecution's evidence was overwhelming – to negotiate a favourable guilty plea. Again, in Bouhired's case, a conservative defence approach might be to agree a plea of guilty on the basis that the death penalty would not be imposed. Verges would have called this the *defense de connivance* – a collaboration defence. He took the view that Bouhired's trial should not be a 'play for sympathy as left-wing lawyers advised … from the murderous fools who judged us'.[420]

Verges took a different approach. He attacked not the evidence, or indeed the police or security forces; he attacked the court itself. He refused to acknowledge that the bombing of the cafe was a criminal offence and accused the court of being complicit in the army's *corvée de bois* (woodcutting – here a euphemism for torture) tactics. Jacques Derrida called this a 'radical contestation of the given order of the law, of judicial authority and ultimately of the legitimate authority of the state that summons his clients to appear before the

[419] Cobain, *Cruel Britannia,* p189. McGonigal was one of the 'originals' of the SAS regiment and a Catholic
[420] Quoted in Easton, Richard, 'A case in point: a once powerful weapon', *Solicitors Journal*, 20 September 2013, available at http://www.solicitorsjournal.com/blog/case-point-once-powerful-weapon

law'.[421] Verges took the view that another role rupture strategy plays is to highlight the arbitrary nature of the relationship between accused and accuser.[422]

This strategy, in purely immediate legal terms, is unlikely to work, in the sense that a judge is unlikely to find in favour of the insurgent. Indeed, in the case of Djamila Bouhired, the result – from the narrow perspective of the trial itself – was conviction and a death sentence. The sentence was never carried out and Bouhired was eventually to marry Verges and become a senior member of the government of independent Algeria. From the perspective of the insurgent campaign in Algeria, the trial of Bouhired was little less than a triumph: Verges had succeeded on the international stage in changing the narrative from the French story of a savage terrorist attack into his version of an illegitimate state engaged in the oppression of a legitimate struggle. The fact that he had done this through the medium of a trial is testament more to his courage than his originality.

Other perhaps more nuanced critics have suggested not only that Verges and the 'rupture strategy' was not original,[423] but also that it amounted to nothing more than a 'rehashing of the "tu quoque" argument advanced by the defendants at Nuremburg and that it was very much a tactic of its time in terms of the effect it had'.[424] They say that Verges was employing a tactic advocated by, among others, Lenin, who said that Bolsheviks accused before courts should 'defend their cause not their freedom ... [and] address the masses over the heads of the judges'.[425] As contemporary journalist Ted Morgan, who had been present in Algiers throughout the war, points out, it was not only the 'masses' to whom Verges was appealing; his target was also the elite of metropolitan France.[426] Certainly the Bouhired trial was very much 'of its time', set as it was in the context of a 'war of liberation' in an age of 'wars of liberation'. With its use in the Bouhired trial, Jacques Verges made the term 'rupture strategy' part of legal vocabulary, even if only in a fairly rarefied area of practice. Verges was content, as well he might be, to acknowledge that he was not the first to use this tactic.[427]

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[421] ibid.
[422] Verges, *De la Strategie Judiciare*, p97
[423] See Sante-Pierre, Francois, 'Non, Jacques Verges n'a pas invente la defense de rupture', *Le Monde*, 20 August 2013, available at http://www.lemonde.fr/idees/article/2013/08/20/non-jacques-verges-n-a-pas-invente-la-defense-de-rupture_3463953_3232.html
[424] Easton, 'A case in point'
[425] Sante-Pierre, 'Non, Jacques Verges'
[426] Morgan, Ted, *My Battle for Algiers* (Smithsonian Books, 2007), p213
[427] ibid.

As he himself said, it was a strategy used by Jesus and Socrates. The denial of the court's right to sit in judgment is only part of the strategy, however. Without a public hearing, there is simply no point in using 'rupture strategy'. The essence of the strategy is intimately connected with ensuring that the 'message' of the cause is reinforced, while simultaneously undermining the legitimacy of the state. As such, it is as much a strategic communications tool as it is a legal one. Indeed, on purely legal grounds, the technique, as pointed out above, rarely succeeds, save on its own terms.

The Irish Nationalists of the War of Independence (1919–21) were the masters of a multifaceted judicial strategy. Apart from their use of courts to undermine crown legitimacy, they instinctively understood Verges' point that choosing 'rupture' opens the possibility of 'turning the tables, even if you lose'.[428] When it suited their purposes, the Nationalists were more than content to use the Crown Courts for their own purposes. If matters went against them, this could be presented as an example of corrupt justice; if the court decided in their favour, the case could be presented as vindication of the case that had been brought, and thus presented as a victory.

While the default position for those IRA volunteers before Crown Courts was to deny the authority of the court to try them, a draft general order of IRA command stated that 'open permission is granted to all members of the army charged before enemy courts on charges involving the penalty of death to enter into a formal defence if they so desire'. However, permission was not extended to 'men taken in open warfare' for whom a legal defence might be evidentially difficult, as to do so would involve the pointless expenditure of legal fees 'much needed for other matters'.[429]

The courts were also used for civil cases against the crown in the event that property was destroyed or damaged in the course of raids or action by crown forces. These would be made under the Criminal Injuries (Ireland) Act 1919. Indeed, awards were made by Crown Courts in favour of next of kin of persons killed. Senior Republican figures were perfectly prepared to bring such actions. Judgments in favour of such litigants were used in propaganda efforts.[430] This in turn assisted in efforts to ensure that the message of the

[428] Verges, *De la Strategie Judiciare*, p22
[429] Quoted in Foxton, *Sinn Fein and Crown Courts*, p228
[430] ibid., p266

rebellion was sustained and extended, particularly in the US, as well as at home. Every effort was made to hobble crown forces through crown (UK state) courts. Using coroners' inquests into those killed by British forces was a particularly effective tactic. The first, and arguably most celebrated, case concerned the inquest into the death of Thomas Ashe, who died after a failed attempt to force-feed him on a hunger strike in 1917. The jury's verdict condemning the government's treatment of Ashe and censuring the British authorities was nothing less than a propaganda triumph.[431] It was the first of many such coroners' verdicts that went against the crown. These courtroom victories were given great prominence in Nationalist media, with stress being placed on the argument that the verdicts reflected all the worse on the British by virtue of the fact that the juries were 'selected and summoned by the police'. Obviously adverse verdicts were either not reported or were presented as instances of bias.

In one case, an attempt was made in the Crown Court to stop police raids on Sinn Fein's pamphlet printing house. Although the case was eventually lost, 'we had got our objective in the breathing space created and our literature was made available'.[432]

The link between these cases (and many like them) and the media was critical. The Nationalists were fortunate to have the remarkable Erskine Childers as the Irish Parliament (Dail) director of propaganda, with the declared aim of ensuring that 'the matter of Propaganda abroad would be on a much wider scale'.[433] Childers also edited the *Irish Bulletin*, distributed in England, Ireland and the United States. The *Bulletin* regularly reported courtroom victories and criticised defeats as examples of 'corrupt British justice', echoing *avant la lettre* Verges' view that even in losing, the tables could be turned. Childers and his team ensured that the message of the Nationalist courts' fairness was carried

[431] ibid., p200
[432] ibid., p204
[433] See Dail debates, 11 March 1921, available at http://www.oireachtas-debates.gov.ie/plweb-cgi/fastweb?state_id=1256131762&view=oho-view&docrank=13&numhitsfound=17&query=bulletin&query_rule=%28%28$query1%29%3C%3DDATE%3C%3D%28$query2%29%29%20AND%20%28%28$query4%29%29%3ASPEAKER%20AND%20%28%28$query5%29%29%3Aheading%20AND%20%28%28$query6%29%29%3ACATEGORY%20AND%20%28%28$query3%29%29%3Ahouse%20AND%20%28%28$query7%29%29%3Avolume%20AND%20%28%28$query8%29%29%3Acolnumber%20AND%20%28%28$query%29%29&query1=19190101&query2=19250101&docid=23430&docdb=Debates&dbname=Debates&sorting=none&operator=and&TemplateName=predoc.tmpl&setCookie=1

nationally and internationally, with foreign journalists being granted access to the underground tribunals by the propaganda department of Sinn Fein.[434]

Rupture in its traditional form, as espoused by Verges, is still used by lawyers. The legitimacy of the very existence of military commissions to try Al Qaeda and other terrorist suspects was a particular issue throughout the decade-long saga after they were instituted by President George W. Bush in November 2001. In the first major account of the US Military Commission procedures, *The Terror Courts*, Jess Bravin relates that in the chaotic arraignment hearing for the alleged 9/11 conspirator Khaled Sheikh Mohammed in May of 2012, the defendant's lawyer, David Nevin, struck at the core of the controversies by challenging the right to exist of the court before which he was appearing. He 'questioned whether by wearing a judicial robe [the Commission's military judge] Pohl had prejudged one of the central issues "the legitimacy of the structure of the court itself," something that had never come up in any case in Nevin's career'.[435] Nor, one expects, in the careers of the other American lawyers or judicial officials in the room.

In some contemporary judicial discourse, the idea of rupture has undergone something of a small renaissance. The idea of 'immanent critique' has arisen, where, rather than the submissions of a party, judicial activism has resulted in insurgent ideas having real effect in the form of court judgments. For example, in one judgment of the Indian Supreme Court which arose out of the Naxalite insurgency in India, the court stated that 'what we have witnessed in the instant proceedings have been repeated assertions of inevitability of muscular and violent statecraft'.[436] This judgment concerned the activities of a particular group of counterinsurgent paramilitaries, the so-called Salwa Judum, composed of 'Special Police Officers' (SPOs), which amounted to groups of armed tribal youth. These were conscripted into the service of the counterinsurgent state government.

An action had been brought by three claimants alleging widespread violation of human rights by the state authorities. In its judgment, the Supreme Court drew on academic works critical of globalisation and essentially took an approach remarkably in line with much of the

[434] See Townsend, *Republic*, pp129–131
[435] Bravin, Jess, *Terror Courts* (Yale University Press, 2014), p368
[436] *Sandar et al.* v *State of Chattisgargh*, 5 July 2011, Supreme Court of India, quoted in Bhandar, Brenna, 'Strategies of legal rupture: the politics of judgement', *Windsor Yearbook of Access to Justice*, 30:2 (2012), p59

theoretical framework advocated by counsel for the claimants. As a commentator on this case put it, 'the court thus positions the rights to equality and dignity in opposition to capitalist development imperatives ...'[437]

The case Indian academic Brenna Bhandar makes concerning the significance of this case is compelling, in that it shows the continuing potential of *political* shifts originating in judicial authority. As she says 'a strategy of rupture might involve an exposure of the contradictions that inhere in colonial capitalist legal orders that eviscerate the potentiality that rights hold to enable individuals to live lives free of fear violence and exploitation ... through the act of judgement'.[438] One is tempted to state that the 'might' in that characterisation is the key modifier. She is undoubtedly right, though, when she says that 'it is clear that an independent judiciary does have the power to disturb the monopoly of violence exercised by the government and to transcend this disturbed framework by offering a radically different interpretation of security and freedom'.[439] By way of comment, courts in a free society have the potential to achieve even more than this. The question as to what social, psychological or political forces ensure that this potential is rarely (if ever) exercised lies beyond the remit of this thesis. While Bhandar argues that this is an example of 'rupture', a case could well be made that it was an instance of 'disruptive litigation' (see below).

'Rupture' and the narrative

The rupture strategy, as described and practised by Verges and essentially epitomised by the Irish judicial strategy, may have had effect in both Algeria and Ireland. However, the strategy is of little use in the absence of two key factors. If an accused person in, for example, an Iranian or Russian state court is accused of 'terrorism', little effect will be had if he denies the authority of the court to try him and attempts to subvert that court. The response of those authorities may simply be to close the courts to public access and deny the accused any form of publicity. Further, the decision of the court in such societies may have little in common with notions of 'fair trial': the trial is likely simply to be more in the

[437] ibid., p75
[438] ibid., p77
[439] ibid., p78

nature of a production line than an examination of the factual and legal issues surrounding the accused's alleged crime. There needs to be an element of basic notions of 'rule of law', as well as judicial professionalism. In other words, in order to work, the 'target' court needs to operate in an environment approximating to Western notions of 'rule of law'. In both Ireland and Algeria, this was to a very great degree the case – at least to the extent that the rhetoric of the law was complied with to some extent. In order to have purchase, notions of 'using the courts against themselves' must have a degree of credibility. In such circumstances, courts' claims to professionalism and compliance with legal norms should have some basis in fact, or at least perceived fact. It may be worth mentioning at this point that even martial law courts in democratic countries may display such characteristics. As Foxton points out in his *Sinn Fein and the Crown Courts*, there was a sense of 'punctilious legalism' alongside brute force in the British approach in Ireland.[440] One leading defence lawyer for IRA volunteers, Tim Healy, had a high regard even for the courts martial officers in Ireland, who could sometimes be reasonably fair: 'As a rule courts composed of officers of the British Army make a fine tribunal.'[441] Few would consider attempting the rupture strategy in a closed court presided over by judges employed only to process convictions, or indeed a Court Martial composed of military officers in an operational zone.

Secondly, rupture strategy requires the voice of rupture to be heard by an audience outside the courtroom. This requires a degree of media access and freedom. Indeed it is at such media that rupture strategy is aimed. Once again, to refer to Rupert Smith's characterisation of contemporary war being a form of theatre, a theatre needs an audience, and with the 'rupture' strategy that audience has to be in the form of media. Ted Morgan, the American journalist reporting from Algiers at the time of the Bouhired trial, wrote that Verges, the defence lawyer, 'had little concern for the truth': he was 'playing to that part of public opinion in France that had turned against the war'.[442] This was certainly true, but that was exactly the point. 'Truth' was secondary at best: Verges purpose was to advance a cause, and playing to the 'home front' was one way of doing so. And that depended on having an audience which was supplied by the international media. In today's terms, his actions would be considered to be an effective information operation.

[440] Foxton, *Sinn Fein and Crown Courts*, p193
[441] Healy, Tim (KC), 'Letters and leaders', quoted in ibid., p262
[442] Morgan, Ted, *My Battle for Algiers* (Smithsonian Books, 2007), p213

As well as being tools of government and insurgency, courts may also be platforms for political declarations. Castro's speech 'La historia me absolverá'[443] was made in open court.[444] It is still a key text in Cuban society today. Similarly, all of Verges' classic trials took place with full media presence. Rupture, and indeed a wider judicial strategy, is and must be part of a strategic communications narrative, and for it to have a place in such a narrative, there has to be a means of propagation. Such a narrative will, in its essence, act as a foil to the counterinsurgent narrative of adherence to human rights, due process, etc.

Rupture is a complement to the development of insurgent courts, which will be looked at in the next chapter. As insurgent courts undermine the legitimacy of state courts in the domestic realm, while promoting their own legitimacy, rupture attacks that legitimacy from within the courtrooms of the state. Cogently and professionally conducted, and in the right context, it can play a key part in insurgent judicial strategy. As will be further stressed in Chapter 3, the Irish Nationalist strategy amply demonstrated in 1919–21 the potential of an insurgent judicial strategy.

Disruptive litigation

If lawfare is the means by which 'law is used as a means of achieving military objectives',[445] 'disruptive litigation', like 'rupture', is a weapon within that realm of warfare. It might be defined as 'the use of court decisions to influence the conduct of strategy or operations in war or conflict'. There are two clear categories into which such litigation (defined here as the conduct of court proceedings) might fall. The first is hostile disruptive litigation; the second is non-hostile disruptive litigation.[446] The difference lies rather more in the intent of the litigant or claimant (the persons bringing the case). 'Hostile disruptive litigation' has the intended effect of disrupting counterinsurgent operations. Its non-hostile counterpart may have the *effect* of doing so, but the intent is not present. The latter, as will be seen, has

[443] 'History will absolve me', Castro's speech in his own defence at the Moncada Barracks Trial 1953, available in English translation at http://www.marxists.org/history/cuba/archive/castro/1953/10/16.htm
[444] The speech as it now exists is Castro's recollection of what was said, as no contemporaneous record exists
[445] Dunlap, 'Law and military interventions', p8
[446] The terms are my terms

been common over the last decade, particularly in the context of the conduct of the wars in Iraq and Afghanistan.

In his essay on Chinese lawfare as part of the 'three warfares' idea referred to in Chapter 1, Dean Zheng outlines some scenarios whereby a Chinese legal campaign using US courts, which he calls 'offensive lawfare', could work:

> The most obvious such measure would be the filing of a variety of legal motions in American courts aimed at delaying any American intervention. These motions could be filed in response to a host of issues, ranging from the War Powers Act to the right to mobilize various American resources. More subtle actions could include legal action related to environmental or labor law – areas that, while not directly related to foreign policy and national security, could still have an impact on US military operations.[447]

Zheng's predictions in the context of international conflict, with respect to lawfare, have yet to be fulfilled. In a conversation with me, however, Zheng went further:

> Imagine in the case of a US Navy carrier group approaching Taiwan during a crisis. What better way of disrupting its command structure than, say, removing the admiral by means of false criminal or civil accusations, generated by Chinese agents in the US? Images of child abuse, for example, planted in his personal computer. At the very least the enemy could hope for his peace of mind disturbed. Even better, he might be summoned back to the US. Either way, the operational efficacy of the admiral could be seriously damaged at minimal cost.[448]

Clearly the scope of such potential operations is almost unlimited, provided the resources and will are present. However, within the context of insurgent warfare, there is evidence that the kind of hostile disruptive litigation to which Zheng has drawn attention has in fact been used. In a paper presented to the Fort Leavenworth School of Advanced Military

[447] Zheng, *Winning without Fighting*
[448] Conversation with Dr Zheng, December 2013

Studies in 2010, Juan Padilla, a Colombian officer, wrote about a well-known case that is ongoing in Colombia itself.[449]

The case derived from a famous incident in the conflict between the Colombian government and various insurgent groups and drug cartels in the 1980s. In 1985, a group from 'M-19', an offshoot of the Revolutionary Armed Forces of Colombia (FARC) group, raided the Palace of Justice in the capital of Bogota and took 300 people hostage. An attempted rescue mission by Colombian security forces resulted in 90 deaths. The commander of the operation was one Colonel Plazas Vega. In 1986, the Supreme Court investigated the incident and determined that the actions of the security forces and of Colonel Plazas were within proper bounds, and that culpability lay with M-19. In 1992, convictions were obtained against the M-19 leaders of the operation, although all avoided prison terms. Some subsequently entered politics. Some 25 years after the incident, Colonel Plazas had retired and been appointed by President Uribe as director of the Narcotic Enforcement Office. Padilla says that he achieved great success in that role.

In 2005, proceedings concerning the raid were reopened and Colonel Plazas, who was by now running for Congress, was detained. Pending resolution, he remained in detention and was no longer eligible for political office. Padilla's case is that, by means of politically inspired litigation, Plazas had been removed from the fight against narcotics and insurgency in a democratic country. Whatever the merits of the case, which was very complex and controversial,[450] Padilla's case is that an effective fighter against insurgency and terrorism had been removed through legal means.

Clearly there is a line to be drawn between cases of supposed 'hostile disruptive litigation' and the more common allegations and litigation of abuses by security forces of the kind extensively dealt with in the aftermath of the 'Bloody Sunday' events.[451] Equally clearly, the

[449] Padilla, Juan Manuel, 'Lawfare: the Colombian case' (paper presented to Fort Leavenworth School of Advanced Military Studies, 2010), available at http://www.restauracionacional.org/lawfare-the-colombian-case/

[450] See, for example, 'State Department cable says Colombian army was responsible for Palace of Justice deaths, disappearances', National Security Archive (28 October 2009), available at http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB289/index.htm

[451] The events of 30 January 1972 resulted in the deaths from British army fire of 14 men. Two extensive inquiries followed, the first by Lord Widgery is often criticised as a 'whitewash' (see, for example, Cohen, Nick, 'Schooled in scandal', *Guardian*, 1 February 2004, available at

real motives of claimants in cases of hostile disruptive litigation may only become clear years or even decades later; for if they were clear at the time, it is unlikely that courts would entertain claims. It is vital, generally, that such motives are concealed. There are occasions when there is no such attempt. For example, credible media reports assert that Hamas has made attempts to secure British lawyers to ensure the arrest of Israeli military and political leaders should they ever visit the United Kingdom.[452] In all such cases, the effect of such actions is twofold. First, a successful case brought might remove inconvenient or effective leaders from the enemy incumbent's order of battle. Second, whether or not the legal action is won, there is significant narrative and strategic communications value in simply the fact of having brought the case. By engaging British lawyers in the manner alleged, Hamas succeeded in raising the profile – and possibly the credibility – of their cause.

Non-hostile disruptive litigation as the enemy's strategic partner?

It is difficult in many cases to disentangle the motives of litigants from the arguments in the cases themselves, or indeed from the effects those cases might produce. The leading human rights case of *Ireland* v *UK* arose out of the use by British forces in Northern Ireland of techniques of interrogation against suspects that, it was alleged, amounted to torture.[453] As well as reaching back to the early days of the Northern Ireland campaign, the consequences of this judgment and the facts that gave rise to it remain contemporarily relevant, not only in the development of British policy on interrogation –which it directly continues to affect – but in the framing of the narrative relating to British counterinsurgency in the contemporary context.

As an example of 'lawfare' – conflict in the domain of law but impacting directly on the conduct of operations, the legitimacy of those operations and, further, the legitimacy of the counterinsurgent cause – no case has had more impact. It set the tone for discourse on British counterinsurgency specifically. It also provided much of the background to the even

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http://www.theguardian.com/politics/2004/feb/01/davidkelly.politicalcolumnists); the second, under Lord Saville, was the most expensive inquiry in British legal history and ended in 2010

[452] Coughlin, Con, 'Hamas helping British lawyers target Israel', *Daily Telegraph*, 21 December 2009, available at http://www.telegraph.co.uk/news/worldnews/middleeast/israel/6850900/Hamas-helping-British-lawyers-target-Israel.html

[453] *Ireland* v *United Kingdom* application no. 5321/71 (judgment dated 18 January 1978), available at http://www.cvce.eu/en/obj/judgement_of_the_european_court_of_human_rights_ireland_v_the_united_kingdom_18_january_1978-en-e07eaf5f-6d09-4207-8822-0add3176f8e6.html

more critical discourse surrounding UK and US activities during the Iraq and Afghan wars of the early twenty-first century. However, the litigant in the case was the Republic of Ireland, not a combatant. Nor was it particularly sympathetic to the political aims of the Provisional Irish Republican Army (IRA) whose alleged members were the internees subject to the torture and ill-treatment that was the subject of the case. Was this 'litigation warfare'? Was it disruptive litigation? In one sense, of course, it was. The intent was surely to stop the ill-treatment of detainees that the Republic of Ireland claimed as citizens. However, the intent was not to impede the aims of the United Kingdom's security forces, let alone advance those of the IRA.

Similarly – and moving to a far more recent conflict – few would suggest that Maya Evans, the British peace activist whose cases will be discussed below, had any sympathy for the Taliban, who might well (had they been asked) have approved of her actions as much as some elements in the British armed forces fighting the Taliban would have regarded them as providing 'aid and comfort to the enemy'. Whatever the motives for such litigation, it is the incumbent or counterinsurgent who is on the defensive. No state entity will bring cases in the United Kingdom against, for example, the Taliban for actions in Afghanistan. And even were they minded to do so, the chances of any judgment being enforced would be nil.[454]

From the conceptual perspective, such actions tend to erode incumbent legitimacy. Writing on Stephen Neff's landmark *Justice in Blue and Gray* on the use of law in the United States Civil War, one reviewer stated:

> Law becomes a strategic partner – a lubricating oil smoothing accomplishment of national security objectives – when it produces a perception that military operations are, or even that the war itself, is legitimate and therefore righteous and supportable. Law becomes the *enemy's* strategic partner, however – that is, creates friction in the other direction — when it produces the opposite result. This is so because law in war operates on, against and within all three aspects of what

[454] Although there have been successful efforts in the civil courts to sue alleged members of a 'real IRA' team who were found to have caused the Omagh bombings in 1998, killing 28. See *Belfast Telegraph*, 'Omagh Bomb families win multi-million pound legal case', 8 June 2009, available at http://www.belfasttelegraph.co.uk/news/local-national/omagh-bomb-families-win-multimillion-pound-legal-case-28482210.html; one solicitor, Jason McCue, who brought the case, is also engaged in actions against the Libyan government for support of the IRA during the 'Troubles'

> Clausewitz once called the 'paradoxical trinity' of which war is composed: the people, the commander and his army, and the government.[455]

On occasion, the 'friction' produced that might benefit the 'enemy' may be initiated (or indeed created) by parties not directly involved in the conflict. Typically, over the last decade, such people have often been anti-war activists or human rights campaigners. Certainly in the Iraq and Afghan cases in the UK, referred to above, this has been the case. The view taken by some US observers is that within the context of the 'war on terror' – 'in grim reality, a prolonged, worldwide irregular campaign'[456] – these actors have had some success.

'During the past decade the United States and its citizens have been subjected to numerous legal actions in European and domestic courts that appear to be aimed at negatively impacting the United States' ability to fight Islamic extremists.'[457] There may be some confusion, to put it mildly, between the effect and the intention. The effect of litigation aimed, for example, at curbing bomb attacks (be they 'drones' or other delivery systems) by US military assets, including 'special forces', may well be to 'negatively impact' the vast capabilities of the US military machine. In very many – indeed most – cases, the intention is rather to act to enforce what proponents might argue were, until the last decade, well-accepted tenets of the law of the use of force. While some may characterise such an approach as 'abuse',[458] others would see it as the exercise of litigation to entirely appropriate legal ends. For example, when Italy indicted CIA officers for kidnapping, allegedly for the purposes of rendition, was this a legitimate action by a state in support of its security and legal integrity, or an attack on the US capability to fight 'terror'?[459] While the result might be to blunt the discretion of US military commanders – in that case affecting

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[455] Kaufman, Alan G., 'Review of *Justice in Blue and Gray*' (by Stephen Neff) 2010), 7 March 2012, available at http://www.lawfareblog.com/2012/03/justice-in-blue-and-grey-a-legal-history-of-the-civil-war/#.UvonBkDivIV

[456] Gates, Robert M., 'A balanced strategy: reprogramming the Pentagon for a new age', Foreign Affairs, 88 (January–February 2009), available at http://www.jmhinternational.com/news/news/selectednews/files/2009/01/20090201_20090101_ForeignAffairs_ABalancedStrategy.pdf

[457] Holzer, Mark, 'Offensive lawfare and the current conflict', *Harvard National Security Journal* , 20 April 2013, available at http://harvardnsj.org/2012/04/offensive-lawfare-and-the-current-conflict/

[458] ibid., para 3

their discretion to kidnap nationals of another state from the streets of a third (and allied) country without reference to that state – that is not the intent.

By the same token, is the use of the Alien Tort Claims Act a restriction on the discretion of other countries to use torture? The Alien Tort Claims Act has been used to sue for 'victims of Palestinian terrorist organizations' in Israel.[460]

Non-hostile disruptive litigation and the US home front 2001–14

Clearly even 'exogenous' counterinsurgency campaigns are not confined to the borders wherein the military interventions take place. There is a long history of counterinsurgencies being fought – and arguably won – in the countries of the intervening states themselves. Vietnamese General Giap said in an interview that 'the [Vietnam] War was fought on many fronts ... the most important one was American public opinion'.[461] Rather more recently, in his memoirs, the former UK Chief of the General Staff, the professional head of the British Army, said: 'Losing popular support at home is one guaranteed way to lose a counterinsurgency campaign, as the Americans discovered to their cost in Vietnam.'[462] The 'home front' has, over the counterinsurgencies of the early twenty-first century, been a vital part of the campaigns.

Clearly this has involved many layers of discourse, argument and narrative, ranging from the polemic to the academic. From the legal perspective in both the United States and the United Kingdom, the courts have provided a forum for some of the controversies surrounding the wars to be played out. In the United States, the matters litigated (and which have entered or influenced public discourse on the 'war on terror') have largely concerned questions surrounding detention and interrogation, and the extent to which American courts have jurisdiction over such matters. There has been particularly intense litigation over the detainees in Guantanamo Bay, many of them Taliban or other insurgents. The cases brought in the so-called 'military commissions' were frequently seriously hobbled

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[459] See 'Italy indicts 31 in alleged CIA kidnapping', Associated Press, 16 February 2007, available at http://www.msnbc.msn.com/id/17184663/

[460] *Almog* v *Arab Bank, PLC,* 471 F. Supp. 2d 257 (E.D.N.Y. 2007) (No. 04-CV-5564), available at http://www.motleyrice.com/files/9-11-to-bankrupt-documents/almog-et-al-v-arab-bank-complaint-12-21-04.pdf

[461] General V. Giap, quoted in Langer, Howard, *The Vietnam War: An encyclopedia of quotations* (Greenwood Press, 2005), p318

[462] Dannat, General Sir Richard, *Leading from the Front* (Corgi, 2011), p382

by the use of torture and mistreatment.[463] This has had an effect on the narrative of the wars, with allegations made in court providing excellent copy for the media in the context of portraying the campaigns in an often negative light.

A series of legal cases concerning both the Iraq campaigns of 2003–11 (for the British) and the Afghan campaign of 2001–14 casts light on the approaches taken, or not taken, to the use of courts – and to some extent on the way in which the stark choices portrayed by Frank Kitson have been approached. They further highlight the importance of having a legal strategy. Incidentally, the international and domestic human rights implications of attempting to ensure at the very least a sound courts framework in the various theatres of operation have also been elucidated.

General Michael Dunlavey (Commanding Officer Joint Task Force 170 Guantanamo Bay until November 2002) conflates the cases ostensibly brought to enforce constitutional liberties with the activities of 'terrorists':

> I know where you are coming from, but when it comes down to it, when it is about protecting rights, we have to come up and develop a way to deal with terrorists who use the legal system against us. [464]

He was referring here to the Hamdan stream of cases in the US Supreme Court,[465] which imposed serious restrictions on the jurisdiction of the 'military commissions' set up to try alleged Al Qaeda operators in the US naval base at Guantanamo Bay, which has been described as a 'legal black hole'.[466]

Another perspective is, of course, that if the United States and its allies complied with international law, their problems might be somewhat lessened. Critics see the US as the leading proponent of lawfare, and that lawfare cuts two ways. Rather than the US being the

[463] Bravin, *Terror Courts*, pp322–323 describes the Qahtani case in some detail; the case was dropped, as were many others due to evidence being determined as inadmissible because it had been obtained under torture by CIA operatives

[464] Quoted in Sands, Phillippe, *Torture Team* (Penguin, 2009), pxiv

[465] See, for example, the stream of cases referred to in the United States Federal and Supreme Courts judgment of *Hamdan* v *Rumsfeld* (US SC), available at http://www.supremecourt.gov/opinions/05pdf/05-184.pdf

[466] See, for example, Bravin, *Terror Courts*, p204

'victim' of lawfare, it is a leading practitioner. One Pakistani scholar, Ahmed Dawood, puts it thus:

> Military prowess is not enough in this age; and the United States knows it. America's 'other army' – its less visible but equally potent cadre of skillful [*sic*] lawyers (in government and even in private practice) – dutifully got busy crafting appropriate international law narratives for the War on Terror. They realized that winning the battle for defining 'legality' on the world stage was critical. Until you build the capacity to counter the dominant narrative and promote competing interpretations of what is 'legal' in international law, you will continue to be outwitted in international affairs not just on the battlefield.[467]

Dawood identifies here the link between law and narrative. Such narratives do not operate only on the international level. Insurgencies are at least as concerned to capture and dominate domestic narratives of 'legitimacy' using, among other tools, the law and courts.

Charles Dunlap states that the revelation of the torture at Abu Ghraib was the 'US Military's most serious setback since 9/11',[468] a thought echoed by David Kennedy, who said it was 'a military defeat'.[469] Kennedy may well be right, but the setback was not legal – except insofar as the activities forming the basis of the setback happened to be illegal (torture being a crime in the United States). The very few criminal prosecutions brought as a result of these crimes attracted far less attention than the iconic photographs of the abuse at the prison. The setback was presentational.

Non-hostile disruptive litigation in the UK: the Iraq and Afghan cases

The treatment of detainees in Iraq by UK forces has been controversial from the outset of the Iraq War itself in 2003. The death in custody of Baha Mousa in 2003[470] catalysed a series

[467] Ahmed, Dawood, 'America's army of lawyers is almost as deadly as its drones', *Guardian*, 20 November 2013, available at http://www.theguardian.com/commentisfree/2013/nov/20/us-drone-strikes-pakistan-legal-debate

[468] Dunlap, 'Lawfare', p34

[469] Kennedy, *Of War and Law*, p119

[470] For full details of this case and its aftermath, see TSO, *Report of the Baha Mousa Inquiry* (TSO, 2011), available at http://webarchive.nationalarchives.gov.uk/+/http://www.bahamousainquiry.org/

of investigations, trials and inquiries which, at the time of writing in mid-2014, continue.[471] In terms of litigation and its feedback into operations, two cases dominated the discourse. The first was that of Mazin Al Skeini and others who were shot dead by a British patrol in Basra in August 2003. The other was that of Hilal Al Jeddah, a prisoner who sued the British government, alleging mistreatment at the hands of UK soldiers during his detention for over three years in a UK military detention facility in Basra.[472]

A further matter concerned Hamid Al-Sweady. This was a rather different kind of case, wherein it was alleged that prisoners taken by British soldiers after a battle were tortured, killed and their bodies mutilated. It became the subject of an inquiry.[473] The Al Skeini and Al Jeddah cases established that the British authorities were responsible legally, under the European Convention on Human Rights and the Human Rights Act, for those killed or detained. Neither the detail of the judgments nor the legal reasoning behind them is immediately relevant for present purposes. These judgments had military and political *effect*, in that first they altered the parameters within which military operations take place, and second, to some degree they shifted the debate from the political purpose of the missions to the manner in which they were conducted, with intense press focus on the behaviour of UK forces.

A similar effect can be observed from another stream of cases, brought in the civil courts of England and Wales by Maya Evans,[474] 'a peace campaigner opposed to the presence of UK and US armed forces in Afghanistan'.[475] These concerned the allegation that the transfer by UK forces of detainees captured in combat to the Afghan authorities for trial was unlawful, as the detainees were thereby exposed to torture, ill-treatment and unfair trials. It was decided in these cases that the safeguards introduced by the British were adequate,

[471] See also TSO, *The Report of the Detainee Inquiry* (TSO, 2013), available at http://www.detaineeinquiry.org.uk/, and Al-Sweady Public Inquiry Team, 'The Al-Sweady Public Inquiry', available at http://www.alsweadyinquiry.org/ (which continues)
[472] *Al Skeini and others* v *United Kingdom*, application no. 55721/07 at European Court of Human Rights. *Al Jeddah* v *United Kingdom* application no. 27021/08 at European Court of Human Rights. For a sound summary of these rather complex issues, see http://www.interights.org/al-skeini/index.html
[473] Al-Sweady Public Inquiry Team, 'The Al-Sweady Public Inquiry', available at http://www.alsweadyinquiry.org/
[474] *R (on the application of Maya Evans)* v *Secretary of State for Defence* (2010 EWHC 1445 Admin), available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-evans-v-ssd-judgment.pdf and *R (on the application of Maya Evans)* v *Secretary of State for Defence* (2013 EWHC 3068), available at http://www.bailii.org/ew/cases/EWHC/Admin/2013/3068.html
[475] *R* v *Secretary of State for Defence* (2010), para 2

although barely so. A further case was brought in 2012 by Serdar Mohammed, a detainee captured by British forces and transferred to the Afghan authorities, who allegedly tortured him.[476] This case was brought on much the same grounds, and the information provided indicated that the safeguards were most certainly not adequate.[477]

In all of these cases, much effort was made by the British authorities to make sure that the matters being litigated were brought under provisions which would ensure that the proceedings were secret. In one of these cases it was stated that: 'The importance of the case lies not only in its subject matter but in its implications for security in Afghanistan and the effectiveness of UK [counterinsurgency] operations there.'[478] We do not discuss further here the extent to which the judgments (which, it is fair to say, largely favoured the accounts given by the UK authorities) were informed more by a desire to ensure the continued 'effectiveness of UK operations' than by a willingness to cease handing over detainees to a regime with a highly questionable human rights record (and specifically to the Afghan Intelligence Service, the NDS).[479] However, what is clear is that, once again, the *effectiveness* of operations was perceived to be at stake. Much effort was expended by UK personnel in Afghanistan as a result of these cases,[480] and it is apparent that there was a real concern to ensure compliance with relevant legal strictures *as a result of these cases*.

Clearly these cases are not to be confused with the category identified as 'hostile disruptive litigation' of the kind described above, envisaged by Dean Zheng and indeed carried out by Colombian insurgents and others. The litigants in such cases fully understand that their role is as often unwilling participants in the conflict, not as active supporters of one side or the other – and certainly not as combatants. However, in bringing actions in the forum of

[476] *R (on the application of Serdar Mohammed)* v *Secretary of State for Defence* detailed 'Grounds of Claim', available at http://www.reprieve.org.uk/static/downloads/2012_03_23_PUB_Serdar_Mohammed_Grounds_of_Claim.pdf
[477] *R (on the application of Serdar Mohammed)* v *Secretary of State for Defence* (2012 EWHC 3454 Admin), available at http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2012/3454.html&query=Serdar+and+Mohammed&method=boolean. The case continues; see http://www.leighday.co.uk/International-and-group-claims/Afghanistan for updates
[478] Lord Justice Richards in *R (on the application of Maya Evans)* v *Secretary of State for Defence* (2010 EWHC 1445 Admin), para 1
[479] For a fuller discussion, see Maya Evans (2010) case at paras 58–75
[480] Discussions with several legal and military intelligence officers

courts, they know that 'the audience are not just the people in the war zone, nor even the population of all the belligerent states, but the court of world opinion'.[481]

As such, they instinctively comprehend that perceptions are at least as important as the outcome of the cases they pursue. In his study of contemporary strategy, *The Direction of War*, Professor Hew Strachan writes:

> The newness of the challenge posed by non-state actors in war to our understanding or strategy is far less the fact that they do not belong to states than the fact that they have displayed a better understanding of the trinity of strategy. Like Maoist guerillas, at least in Maoist theory they recognize that the people must be participants even if only passive and secondary ones not neutral onlookers.[482]

As stated above, the litigants, of course, are not themselves insurgents. Nor do they necessarily adopt the views or objectives of the insurgents in Iraq or Afghanistan. Nonetheless, as one solicitor involved in the Maya Evans cases acknowledged: 'There is a political purpose behind this litigation. What gets us up in the morning is the prospect of making change … I had a concern about the military not operating under law. It's all about government operating under law.'[483] While the objectives of those involved in such cases may not be to impact on the operational effectiveness of UK or allied forces on the ground in the operational zones of Iraq or Afghanistan, the result is that there is effect.

It should have come as no surprise to the British government that detention in Iraq and Afghanistan became a 'live issue'. Yet it is clear that even in 2012, when the Evans litigation was brought before the courts, no policy or strategy was in place. As pointed out above, David Kennedy observed of the scandal of torture and abuse of prisoners at the US-run Abu Ghraib prison near Baghdad that 'the whole episode was clearly a military defeat'.[484] Surely the same argument can be made of the British experience, albeit at a far reduced level of global impact.

[481] Strachan, *Direction of War*, p279
[482] ibid.
[483] Discussion with solicitor closely involved in the Maya Evans cases
[484] Kennedy, *Of War and Law*, p119

'Legal feedback': disruptive litigation and the effect on operations

A 'targeting meeting' is a regular occurrence in modern warfare. It is usually composed of representatives of all those involved in the planning and execution of missions to destroy, kill or capture enemy 'assets', be they human or otherwise. Such meetings will generally include the 'kinetic element' of warfare – those who will actually conduct the mission; there will be intelligence officers to brief the meeting on what is known about the target; there may well be a 'psyops' (psychological operations) officer to look at the media or 'info ops' (information operations) potential that may be inherent in the mission. There may be a civilian representative to analyse the political impact, if any, of destroying or killing the target. At all such meetings, however, in the twenty-first century the one certain presence will be the lawyer, who will be trained and qualified in the 'operational law' referred to above: in other words, the application of the laws of war (*ius in bello*) to the operation itself.

A NATO military intelligence officer gave me his account of one such 'targeting meeting' in Afghanistan. The purpose of the meeting was to assess certain individuals for 'kill or capture' raids. When the agenda reached a particular individual, the 'psyops' officer said that, rather than killing or capturing him, another way of dealing with the 'target' might be to put about rumours concerning his sexual proclivities. At this point the legal advisor stated that this might contravene the local law on slander, or indeed the law of the country/countries whose officers were present and who would carry out the mission. The commander of the unit tasked with 'kill or capture' replied: 'Alright, can we kill him?' The legal advisor is said to have stated that there was no reason why he could not be killed. The officer did not tell me what was actually decided.[485]

That the law influences the day-to-day conduct of counterinsurgency operations is nothing new. What is relatively new is the effect of the potential for litigation and the use of courts in the home countries of counterinsurgents who are exogenous or foreign to the country in which they are operating. This litigation has had a feedback effect on the conduct of

[485] Discussion with NATO military intelligence officer, March 2014. A similar account was rendered (by a different officer) of another targeting meeting in the same campaign where the legal constraint was not slander but the possibility that capture might result in ill-treatment. In such circumstances authority was given in that case to kill. These accounts have something of the nature of anecdote, but they certainly reflect at the very least a perceived excessive punctiliousness on the part of military lawyers as a result of pressure from domestic litigation.

operations in such places as Iraq or Afghanistan.[486] Over the last decade, this has been particularly evident in the field of the treatment of prisoners and interrogation.[487] This has been a major issue for counterinsurgents endogenous to the insurgencies (i.e. not foreign, such as those in Northern Ireland or, arguably, the French in Algeria).

There is no doubt that there was a 'feedback effect' from the Maya Evans stream of cases for UK forces and operations in Helmand. Such feedback had an effect not only on military operations, as Naina Patel a British civilian 'justice advisor' in Helmand explained:

> … the resources devoted to anti-terrorism prosecutions on the civilian side, a key part of the detainee pipeline, did suggest that this was in part prompted by judicial challenges at home. It seemed to me that such resources ought to have been deployed far earlier with a far more strategic look at the detainee pipeline at that stage.[488]

Patel's comments in some ways bring the issues right back to the beginning: the need to make certain strategic decisions at an early stage in the conflict with respect to legal issues that are highly likely to arise.

Chapter conclusion

Frank Kitson's experience gave him a fine insight into the practicalities of fighting insurgents from the military perspective. His insight into the choice facing those deciding on legal policy was, it might be argued, simplistic. While his understanding of the detail of legal approaches was binary, it was not his role to deal with the detail of legal policy. His real insight – important from the perspective of this thesis – was the understanding that the counterinsurgent needs a legal strategy, which in turn needs to dovetail with the political and military strategy. He understood that war is multidimensional and that one of those

[486] See *Al Skeini and others* v *United Kingdom*, application no. 55721/07 at European Court of Human Rights, judgment available at *Al Jeddah* v *United Kingdom,* application no. 27021/08 at European Court of Human Rights. For a discussion of these cases, see Milanovic, Marko 'Al Skeini and Al Jeddah in Strasbourg', *European Journal of International Law*, 23 (2012), pp121–139

[487] See for example the many cases litigated concerning detention and interrogation in US facilities such as Guantanamo Bay

[488] Interview with Naina Patel, civilian justice advisor to the UK Provincial Reconstruction Team, Lashkar Gah, 2011. Interview dated 29 April 2014

dimensions is the field of law. Like other dimensions, it needs close planning and preparation.

As seen above, Kitson proposed two formulations: the first might be characterised as 'law as a weapon'; the second a 'rule of law' approach. If the counterinsurgents choose Kitson's second formulation as their legal strategy, they lay themselves open to several tactics which are, in those circumstances, always available to aware insurgents. A fair judiciary can always be used against itself. As was seen earlier in this chapter, this can take the form of 'rupture strategy', such as that espoused by Jacques Verges. This technique essentially involves a combination of the denial of the authority of a court with the use of the forum such a court supplies to undermine the legitimacy of the court and disseminate the message of the accused insurgents.

However, a relatively free legal system characterised by a genuine 'rule of law' approach to litigation also lays itself open to lawfare approaches from another flank – the international legal system (and indeed, by extension, its domestic system, particularly if, as in the case of the UK, an international legal regime has been incorporated into domestic legislation).[489] Indeed, even those who select or tend towards Kitsons's first policy – that of using the law simply as a weapon – may find that there are opportunities presented by an assertive international human rights court, or indeed fair domestic tribunals, such as those generally to be found in the United Kingdom. This in turn can affect a state's narrative, and the results of such cases can and do have operational effect, as seen in the Iraq and Afghan streams of cases above.

From the perspective of the research questions, the key point is that lawfare is a vital element in the conduct of insurgencies, as it is in the conduct of all military operations. Both at the level of narrative and operations, 'lawfare' is an important factor and needs to be understood in terms of being linked with a coherent strategy, and indeed subject to a coherent strategy. As pointed out in the introduction, the realm of law, both domestic and international, is simply another forum in which a given conflict might take place. It is itself a field of conflict. This has profound implications for the conduct of warfare. The Kenya cases demonstrate that actions of military or law enforcement assets which transgress acceptable

[489] See the Human Rights Act 1998

legal limits may, in due course, carry the conduct of the psychological or media operations of an insurgency far into the future when those actions are litigated. The consequences of failing properly to appreciate the importance of this may have longer-lasting consequences than the military or even the political elements of the conflict, to both of which, of course, the legal dimension is closely related.

Is there a common doctrine in the theatres (Malaya, Kenya, Northern Ireland and the 'War on Terror') looked at in this chapter? One obvious common thread, and indeed a common element of legacy legislation, was emergency legislation – the installation of laws which are essentially to be used, as Kitson put it, as weapons. There were different outcomes in each theatre. In Malaya, the veneer of legality was just sufficient to maintain legitimacy both in the United Kingdom and in Malaya. Furthermore, it seems clear by looking at the law reports and the press of the time that there was a degree of judicial oversight sufficient to maintain at the very least a credible veneer of 'rule of law'. This did not happen by accident. Uniquely among the theatres looked at here, Malaya had a coherent and consistent strategy and purpose, established early in the campaign.

In Kenya, there was none of the strategic coherence of Malaya. Again, the results were apparent in the legal field. It is clear from recent work done by Elkins and Anderson – and in pursuance of successful litigation in the UK courts – that there was concern about the legitimacy of the activities, including judicial oversight, at the time. This was reflected, as we saw above, even in the UK parliament. The key issue here is that the lack of proper judicial oversight of administrative action, the extent of its compliance with the egregious activities of the security forces, played heavily into the degree to which the British efforts were seen, even at the time, as legitimate. In fact – as well as to a large extent in public perception – the judiciary was an arm of the security apparatus. In Kenya, the courts were used, in Kitson's formula, as a weapon. From the available evidence, the same was true of Cyprus, with very little in the way of judicial oversight of the administrative and security apparatus.

The campaigns looked at here were not exogenous in the sense that they were outside 'interventions'. However, the only strictly 'endogenous' campaign was Northern Ireland – itself a part of the United Kingdom. While it may be that the introduction of the 'Diplock Courts' was to some extent inevitable, given the degree of jury intimidation, it is clear that

the legitimacy of the state was undermined by the way in which emergency legislation cut into well-entrenched ideas of 'rule of law'. Courts were seen by the 'target community' – the Nationalist Catholic community of Northern Ireland – not as independent safeguards of their rights, but as the arm of the state. This was clearly the case in all of the theatres here, with the possible exception of Malaya. That is not to say that the courts in Malaya were not arms of the state, or that the courts in Northern Ireland were supine. Neither of these assertions is correct. In fact, despite perceptions, it can readily be argued that the Diplock Courts were not simply an inert arm of the executive, but a function of a democratic judiciary; the best that could be done in the circumstances. However, that was not the perception; and in counterinsurgency, as current doctrine has it, perception is all.

The Colombian army officer quoted above, Juan Padilla, starkly states the case for increased awareness of future lawfare:

> Democracies must understand holistic lawfare as a growing approach for contemporary confrontation in order to creatively improve their own mechanisms to counter it. After all, lawfare is going to be increasingly used by adversaries as it is becoming an essential feature of twenty-first century conflicts to the point that perhaps in Clausewitzian terms, it can best be described as a 'continuation of war with legal means'.[490]

In none of the campaigns discussed here was there an effective competing 'shadow state' – or, to borrow David Kilcullen's term, any real attempt at 'competitive control' in the domain of justice or lawfare. With the exception of some local attempts at local law enforcement (to be addressed below) by the Provisional IRA, there was no attempt at organised insurgent courts. Was this absence reflective of a lack of awareness on the part of insurgents of the opportunity presented by such 'competitive control'? Or was it a lack of capability imposed by the effectiveness of British security forces in these campaigns. Elements of both factors applied.

As will be seen in the next chapter, setting up a rival system of justice, however ramshackle, can be effective and requires operational and strategic consideration. To some extent this depends on a degree of territorial control, which was largely denied to insurgents in the

[490] Padilla, 'Lawfare'

campaigns discussed here. This denied them the opportunity to take advantage of the use of courts. However, regardless of the military strength (or lack of it) on the part of insurgents, opportunities exist for insurgents to fight in the legal domain beyond courts. This chapter has examined the challenges, opportunities and problems faced by counterinsurgents in the context of lawfare, and some commensurate opportunities for insurgents. The next chapter will look both at the opportunities presented to insurgents by courts not in the use of judgments, but in the use of courts *as weapons*.

CHAPTER 3

Insurgent Courts and Lawfare

'The authority to resolve disputes can necessarily be exercised by only one body (pursuant to the state's 'monopoly on the use of force' that is the first element of the 'rule of law') – imagine the systemic breakdown that would result from two competing bodies claiming the power to resolve disputes.'[491]

Ultimately insurgents are in the business of attempting to 'offer a better deal'[492] to their 'target' populations. As will be seen, whether that is conceptually framed as 'competitive control'[493] or 'shadow government', a key element of any offer is the ability to provide dispute resolution mechanisms and 'justice'. This chapter seeks to show that it is this that is at the heart of insurgent strategy in the field of 'competitive control'. In Shakespeare's play *Henry VI Part 2*, which itself concerns a revolt, a rebel character 'Dick', a butcher, suggests that in order to cement a rebel's (Cade) envisaged role as king there is a requirement: 'The first thing we do, let's kill all the lawyers.'[494] The evidence would seem to suggest that the first thing that many insurgents do is precisely the opposite: they bring courts straight into the heart of the new aspirant government.

This chapter centres on insurgent justice and the provision thereof. In the quotation that leads this chapter, Thomas Nachbar, a leading commentator on lawfare, suggests that two competing bodies claiming dispute resolution powers cannot exist in the same place. On the face of it, this seems to be fair. However, in Chapter 1 several examples were given of such 'competing' authorities in the United Kingdom, without notable civic disturbance. Where there is conflict, however, such competing authorities can have very great strategic effect.

We turn now to look at shadow states or 'competitive control', as David Kilcullen calls it, particularly in the legal 'landscape' that David Kennedy speaks of.[495] The chapter will then

[491] Nachbar, 'The Use of Law in Counterinsurgency', p152
[492] The phrase used to me by a senior Foreign Office official as an objective prior to my deployment as justice advisor in Afghanistan
[493] Kilcullen, *Out of the Mountains,* pp118ff
[494] William Shakespeare, *Henry VI Part II*, Act IV, Scene II, line 77
[495] Kennedy, *Of War and Law*, p33

proceed to examine some instances where 'justice' – or the lack of acceptable, fair dispute resolution systems – contributes to the causes of insurgency. Land is a particularly important theme. The chapter proceeds in Section 2 to examine how some insurgents have used courts and with what results. Section 3 will proceed to examine the legality of insurgent courts in international law.

Section 1

Insurgents, legitimacy and law

If, as current counterinsurgency theory embodied in the US Army and Marines Counterinsurgency Manual has it, 'Legitimacy is the Main Objective',[496] and 'without the host nation achieving legitimacy, COIN cannot succeed',[497] the mechanisms used for dispute resolution – and particularly courts – are surely an important aspect of counterinsurgency. This chapter seeks to demonstrate that successful insurgents instinctively realise the importance of this aspect of social and political life.

Insurgents recognise justice as a key centre of gravity of their effort. As this chapter will seek to demonstrate, successful insurgents have often been aware of this. If 'the population is the prize', it is won partly by providing 'justice' – and being seen to do so – in an acceptable fashion. In so doing, the insurgent establishes and entrenches his own 'legitimacy', while undermining that of the state he opposes. As dynamic and reactive actors, successful insurgents see courts and dispute resolution as an opportunity to take the initiative in a key area of conflict. If, as Yale Professor of International and Comparative Law James Q. Whitman has put it, 'Kingdoms are won and lost in the realms of law and legitimacy',[498] successful insurgents instinctively understand this.

As in any legitimate state, there is a requirement for executive (and to some extent legislative) functions. What is indispensable is the judicial branch – that element of

[496] FM 3-24 (2006), para 1-112
[497] ibid., I-97
[498] Whitman, *Verdict of Battle*, p94

government deputed to resolve disputes and grievances. When the insurgent can provide the means to settle grievances fairly (or to be perceived to do so), he is a long way down the road to replacing the most central of governmental functions.[499]

It is an axiom that, as the French theorist David Galula put it, 'a revolutionary war is 20% military action to 80% political'.[500] Galula strongly implies that this proportion should also apply to counter-revolutionary war. In other words, the effort of the counterinsurgent should comprise at least 80% political action. Going far further back into strategic history, Clausewitz articulated the surely obvious but hitherto unexpressed truth that war is a political act: 'We see, therefore, that war is not merely an act of policy but a true political instrument, a continuation of political intercourse carried on with other means. What remains peculiar to war is simply the peculiar nature of its means.'[501] If we accept that rebellions and insurgencies are 'war', as surely we must, the political element itself comprises a plethora of interwoven elements, one of which is 'justice' and its various manifestations.

The narrative of a viable government, 'revolutionary rehearsals of the exercise of the power they hope to wield one day on a larger scale',[502] as Jon Lee Anderson puts it, is vital internally. There is a growing appreciation that the legitimacy of insurgent courts may have international support, insofar as they may have some juridical or legal status. This is examined later in the chapter.

Shadow states and competitive control

It has been suggested that shadow states, insurgent regimes, require an element of territorial control to succeed.[503] This is not so, as both the Irish and Afghan insurgencies have shown. Territory can be useful, or it can simply act as a focus for incumbent state action. The competition takes place on the functional level, rather than the special.

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[499] See Ledwidge, 'Justice and counter-insurgency in Afghanistan'

[500] Galula, *Counterinsurgency Warfare*, p63
[501] Clausewitz, 'On War', Chapter1, Section 24
[502] Anderson, *Guerrillas*, p172
[503] McColl, Robert W., 'The insurgent state: territorial bases of revolution', *Annals of the Association of American Geographers*, 59: 4 (1969)

Legitimacy, however, is not dependent on it. However, while the possession and control of land may have a function, an absolute sine qua non is the ability to ensure that the insurgent government's strictures are obeyed and that its rule is enforced. This is not necessarily dependent on the exclusive possession of the land.

Taking ideas of shadow states only slightly further is the 'theory of competitive control', advanced in Kilcullen's *Out of the Mountains*, although it draws heavily on Bernard Fall's COIN ideas from the 1960s and Kalyvas's ideas advanced chiefly in *The Logic of Violence in Civil War*. Central to this stream of ideas is the proposal that 'support follows strength':

> Simply put, the idea is that populations respond to a predictable, ordered normative system that tells them exactly what they need to do and not do in order to be safe.[504]

The contemporary insurgent example Kilcullen uses of this kind of control is the Taliban in today's Afghanistan, which we shall go on to examine in detail later in this chapter.

Kilcullen's assertion is that insurgents can take part in this effort by 'sucking the population in' to a framework of 'illicit social control sometimes referred to in classical counterinsurgency theory as "parallel hierarchy" or "guerrilla government"'.[505] He compares insurgents to organised criminals: 'Insurgents in this respect behave much like gangsters', in that they provide regulatory and mediation services where the state fails to do so adequately. In this way, the assertion goes, insurgents are essentially racketeers. The case made is that the key to control is the use of force to establish that control – surely no innovation.

Drawing further on analogies in the organised crime world, he takes examples from Serbian militias in Bosnia and the organised crime groups of the mafia forcing supposedly subject populations to commit atrocities or crimes, thereby making them complicit in the militia activities. He does concede that 'this is at the coercive end of the spectrum of incentives',[506] and he is surely right about that. The argument is made that the key to achieving dominance over the population is coercive force.

[504] Kilcullen, *Out of the Mountains*, p126
[505] ibid., p127
[506] ibid., p131

To some extent Kilcullen's perspective is that of the counterinsurgent, for whom insurgents are, at root, transgressors. There is an admittedly unspoken presumption that legitimacy lies with the 'government'. Unfortunately, in many insurgencies governmental systems of control are rather more virtual than real. As we will see, whereas the physical accoutrements of such instruments may exist in the shape of uniformed police, courts or council offices, the reality for the subject population is all too often that these have little or no effect on their lives, and certainly are in no way capable of exercising meaningful control. It is here that insurgents who may not otherwise be able to compete with state forces on the battlefield can develop an effective advantage.

In Afghanistan, what was happening was that, as conventional military forces 'cleared' areas which were to be filled by 'governance, the kind of governance that filled the 'cleared' space was rather worse in terms of what it could offer than the admittedly ramshackle Taliban equivalent. 'If your strategy is to extend the reach of a government that is corrupt, abusive, ineffective and alienates the people, then the better you execute that strategy, the worse things were going to get.'[507]

Thomas Nachbar says this in a piece entitled 'COIN, lawfare and the rule of law':

> As a competition for legitimacy, an insurgency/counterinsurgency calls upon both sides to provide services to the people in a way that will foster legitimacy. Thus, both the government of Afghanistan and the Taliban seek to provide security in some form, and the party that does the better job of providing the form of security the people demand will gain legitimacy in the eyes of the people and thereby move toward their goal of winning the conflict.[508]

Nachbar's argument is made in the context of the debate over 'lawfare',[509] arguably the central definitional element of this thesis.

For counterinsurgent theorists and practitioners, the unpalatable truth is that 'Parallel structures undermine official statutes in the first place then displace them',[510] where they

[507] ibid., p157
[508] http://www.lawfareblog.com/2010/12/guest-post-tom-nachbar-on-coin-lawfare-and-the-rule-of-law/
[509] See also, for this kind of argument, Holzer, 'Offensive lawfare'
[510] Mahendrarajah, Shivan, 'Conceptual failure, the Taliban's parallel hierarchies, and America's strategic defeat in Afghanistan', *Small Wars and Insurgencies*, 25:1 , (2014), p93

can establish – by force or otherwise – sufficient legitimacy and capability, for example in enforcing decisions of governments and courts. Once it is established, it is very difficult to displace, because 'the creation of a counterstate solidifies the insurgency's support among the population and it is the final step on its path to power'.[511]

Justice and drivers of insurgency

There is an extensive literature on the causes of insurgency. There are clearly economic imperatives. First, some degree of financial support is necessary. In a 2006 essay on the economic causes of insurgency, Paul Collier stressed the importance of the ability of insurgencies to finance themselves. Collier sees insurgencies and the civil wars that ensue as being essentially reliant on having the resources to conduct them:

> The Michigan Militia, which briefly threatened to menace peace in the USA, was unable to grow beyond a handful of part-time volunteers, whereas the FARC in Colombia has grown to employ around 12,000 people. The factors which account for this difference between failure and success are to be found not in the 'causes' which these two rebel organizations claimed to espouse, but in their radically different opportunities to raise revenue. The FARC earns around $700m per year from drugs and kidnapping, whereas the Michigan Militia was probably broke.[512]

It may well be argued that the lack of funding has not inhibited the Afghan Taliban, with a nugatory budget from (at the very least) holding off a multinational coalition of over 100,000 soldiers with a virtually unlimited budget. It has been estimated that in one province of Helmand, the Taliban spent in the region of £14 million, compared to expenditure by the UK alone of in excess of £25 *billion*.[513] Collier goes on to compare insurgents with organised criminals: 'Economists who have studied rebellions tend to think

[511] Sitaraman, *Counterinsurgent's Constitution*, p10
[512] Collier, Paul, 'Economic causes of civil conflict and their implications for policy', Oxford Research Paper (2006), available at http://users.ox.ac.uk/~econpco/research/pdfs/EconomicCausesofCivilConflict-ImplicationsforPolicy.pdf
[513] Ledwidge, Frank, *Investment in Blood* (Yale University Press, 2013), p123

of them not as the ultimate protest movements, but as the ultimate manifestation of organized crime.'[514]

As touched on above, David Kilcullen tends to agree. He conflates the Taliban and a Jamaican drugs gang centred in the Tivoli Gardens area of Kingston, and applies the term 'racketeering' to both of them. In so doing, it might be argued, he subverts the definition of 'insurgency', which by definition must have a component that aims to subvert and replace the existing polity. He frames this analysis in his 'theory of competitive control', which is difficult to disaggregate from ideas of 'shadow states'.[515] There may be some validity in this. However, whether a mature insurgency such as the Taliban or the Cuban Revolution can be framed as 'racketeering' surely depends on perspective. A *counterinsurgent* may well elect to see an insurgency in terms of organised crime on a number of levels, not least in that armed resistance to existing government is a criminal act in all polities. Insurgents and their supporters, however, tend not to see themselves in the same way as, for example, a 'soldier' of the 'Shower Posse' in Tivoli Gardens a criminal gang in Kingston Jamaica dealt with in some detail by Kilkullen, might see himself.

As Kilcullen himself points out, terminology is important.[516] In this thesis, we are concerned not with 'non-state armed actors' – an impossibly wide term, embracing everyone from a bank robber to Al Qaeda and everything in between. Historically, it would also, again depending on perspective, embrace the army of the Confederate States of America, Washington's Revolutionary Army and England's Civil War New Model Army, as much as Al Capone's Chicago 'family'. Here we are concerned with armed groups that aim to subvert *and replace* existing government. It is at that level that legitimacy becomes an active issue, and where the element of justice as expressed in courts becomes a real issue.

David Kilcullen, in his 2009 *Accidental Guerrilla*, presented a further perspective on what might be considered the sources of insurgency. Kilcullen is a retired officer of the Australian army, with combat experience in East Timor. He developed further extensive experience of contemporary insurgency from the perspective of foreign forces intervening in Islamic

[514] Collier, 'Economic causes of civil conflict', p2
[515] In a personal, informal conversation with the author, Kilcullen was somewhat at a loss to distinguish 'competitive control' from 'shadow states'
[516] Kilcullen, *Out of the Mountains*, p126

countries. He serves as an advisor to the US military – and General David Petraeus specifically – on 'counterinsurgency'. He served as an advisor on the drafting of the US Army/Marine Corps Counterinsurgency Manual. His perspectives have, to a great degree, informed US, and consequently NATO, theory on COIN. He has been a prolific writer on this topic, producing two books in the period 2009–10 alone.[517]

In *Accidental Guerrilla*, he discusses the wars in Iraq and Afghanistan in some detail. He claims: 'I have shown how most of the adversaries Westerns powers have been fighting since 9/11 are in fact "accidental guerrillas": people who fight us not because they hate the West and seek our overthrow but because *we* have invaded *their* space to deal with a small extremist element that has manipulated and exploited local grievances to gain power in their societies. They fight us not because they seek our destruction but because they believe we seek theirs.'[518] To sceptics of the whole idea of COIN, this is a statement of the limpidly obvious. Indeed it is surely hardly a new idea that our 'insurgent' is their 'resistance fighter'. This is, of course, in essence the motive of defence. Not surprisingly, Carter and Clark found that 'The affront of having non-Muslim forces on Afghan soil is much-cited by insurgents in person and in their propaganda (and is a significant concern for ordinary Afghans).'[519]

Then there are the psychological elements, the motivation arising from contingent circumstances. Stathis Kalyvas sees unsettled periods generating 'simultaneously a need for strategic non-ideological action and an ideological explication of those actions'.[520] In other words, if an insurgent is going to risk his life fighting a government, there needs to be an identifiable purpose to it. Kalyvas goes on to explain that the motivation existing at the time of the decision may well be reshaped in retrospect. He gives the example of a rebel whose family has been killed by the army who 'wholeheartedly commits to the rebel cause in order to avenge her family (and also because she has nothing to lose). After the end of the war she may reconstruct her initial motivation and claim, and may come to believe that she

[517] Kilcullen, *Accidental Guerilla*; and Kilcullen, *Counterinsurgency*
[518] Kilcullen, *Accidental Guerrilla*, p263
[519] Clark, Kate and Carter, Stephen, 'No shortcut to stability: justice, politics and insurgency in Afghanistan', Chatham House (December 2010), available at http://www.chathamhouse.org/sites/default/files/public/Research/Asia/1210pr_afghanjustice.pdf, p7
[520] Kalyvas, 'New US Army/Marine Corps Counterinsurgency Manual', p46

joined the rebels out of ideological commitment.'[521] The motivations for violent action may be difficult – or even impossible – to identify.

Some researchers have viewed the motives through the eyes of the satisfaction of basic human needs defined in Maslow's hierarchy: that it is unmet psychological needs that drive insurgency, rather than political objectives.[522] It is not at all clear that this is a helpful approach, and is perhaps tautological, since all needs are, at root, psychological, in that they are all motivators. Political objectives, of course, may well – if achieved – fulfil some of those 'unmet needs'.

With respect to 'unmet needs' – whether defined as 'psychological', 'political', or both – one factor which seems to define insurgents (at the very least in terms of narrative) is 'unfairness' or injustice. When such unfairness as perpetrated (or apparently perpetrated) by governments acts deprive people of key assets, insurgency is an option.

Justice and injustice

Guevara looked at the stages of a guerrilla war.[523] The example of the Cuban war was, of course, arguably the leading example of the classic Marxist style of insurgency, if not necessarily a Marxist insurgency. After the first stage of its beginnings and its initial contacts with the enemy, the next stage of development followed when a base area was selected and basic elements of settled life began. In the case of Cuba, they were a show factory, a cigar and cigarette factory, a printing press and other factories necessary for the maintenance of basic existence: 'The guerrilla band now has an organisation, a new structure. It is the head of a large movement with all the characteristics of a small government. A court is established for the administration of justice.'[524]

Guevara attached great importance to the development and enforcement of revolutionary laws, particularly, as we saw above, those pertaining to land reform, which is mentioned

[521] ibid., p46
[522] See, for example Metz, Stephen, 'The psychology of participation in insurgency', *Small Wars Journal*, posted 27 January 2012, available at http://smallwarsjournal.com/jrnl/art/psychology-of-participation-in-insurgency
[523] Guevara, Che, *Guerrilla Warfare* (1960; BN Publishing, 2007)

[524] ibid., p58

time and again in this work.[525] 'The council, or central department of justice, revolutionary laws and administration is one of the vital features of a guerrilla army fully constituted and with territory of its own. The council should be under the charge of an individual who knows the laws of the country; if he understands the necessities of the zone from the juridical point of view, this is better yet.' The guerrillas 'issued a penal code, a civil code, rules for supplying the peasantry and rules of agrarian reform'.[526] The council was essentially the ruling authority for the guerrilla organisation. It is striking that the judicial element and attendant necessary expertise is so explicitly stated. Cuba, of course, is a clear example of that deficit discussed briefly above. The Cuban state, in fact, despite its protestations of democracy, was an almost pure plutocracy. No legitimacy was to be derived from it in the minds of the Cuban people.

Whatever the *style* of insurgency – whether it is a 'new' war or a classic 'Maoist' insurgency (already something of an outdated concept) – there can be little doubt that the element of justice is a very important component.

The journalist and author David Loyn has said that for the people of Afghanistan, justice is the single most important issue.[527] 'Lack of justice is a key driver of the disillusionment felt by many Afghans across the country ... There is relatively little detailed research on individual motivations to join the insurgency, but grievances related to injustice are repeatedly mentioned in interviews and the literature.'[528] In her extensive study of such motivations, 'Testing hypotheses on radicalisation in Afghanistan: Why do men join the Taliban and Hisb-i Islami?', Sarah Ladbury sees the problem from two related angles.[529]

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[525] For example, in ibid., 'The guerrilla as social reformer', p31; 'Civil organisation' pp66–67; 'Epilogue', pp94–95

[526] ibid., p67

[527] Talk at Frontline Club discussing his book *Butcher and Bolt*, 9 October 2009, available at www.frontlineclub.com_videoevents

[528] Clark and Carter, 'No shortcut to stability', p4

[529] Ladbury, Sarah, 'Testing hypotheses on radicalisation in Afghanistan: Why do men join the Taliban and Hizb-i Islami?' Report for the Department for International Development (Co-operation for Peace and Unity, Kabul, August 2009), available at http://d.yimg.com/kq/groups/23852819/1968355965/name/Drivers%20of%20Radicalisation%20in%20Afghanistan%20Sep%2009.pdf

She presents two related hypotheses. The first is that 'the perception of the government as corrupt and partisan' has meant that people have looked elsewhere for guidance and decision making. She finds this hypothesis proved:

> Government corruption and partisanship at provincial and district level was consistently cited as a major reason for supporting the Taliban and Hizb-i Islami in all field study areas and particularly in Kandahar. However, whilst many appreciate the moral form of governance shown by the 'good' Taliban, this it is not a unconditional [*sic*] endorsement for the Taliban movement as a whole due to the numerous categories of 'bad' Taliban.[530]

The second, rather more specific, hypothesis is that not only does the government fail to provide the social good of justice, so that people look elsewhere for it, but that such 'services' as the government does provide are so corrupt and partisan that people are driven not only to opposition, but to what she calls 'extremism'. Again, this hypothesis is supported by the research that she has undertaken:

> The evidence **strongly supports this hypothesis**, with one proviso: it is necessary to add: 'the failure of the state **and Coalition forces to provide security**'. Most respondents were unclear about what international forces are doing in Afghanistan. They do not believe it is to bring security, defeat the Taliban, support democracy or bring development, as they experience none of these. They argue the British are here for revenge and the Americans to pursue regional objectives. Although the Taliban don't deliver security (they attract fire by foreign forces and this endangers local populations) they deliver justice. They are seen to do this reasonably well and attract support as a result.[531]

It must certainly be clear from the foregoing that 'justice' (or the lack of it) has been a key driver of the Afghan insurgency. The question of 'injustice' continues to appear in discourse

[530] ibid., p7
[531] ibid., p7

concerning insurgency.[532] Clearly it is important to understand that 'injustice' is a subjective quality. However, as Tyler points out, and as discussed in Chapter 1, the perception of justice or injustice is rather more quantifiable.

Land as a catalyst for insurgent courts

In the communist, or peasant, insurgencies which dominated the counterinsurgent theorist David Galula's thinking, the root cause, co-opted deceitfully, says Galula, by communist insurgents such as Castro and Mao, was land reform.[533] Whether deceitful or not, the question of land is central to the causes and resolution of particularly rural insurgency. Land reform is explicitly stated by Guevara to be a primary cause of insurgency: 'a few peasants, dispossessed of their land', says Guevara are ideal for forming the nucleus of a guerrilla band.[534] While the struggle is ongoing, a priority is to formulate agrarian policy. Furthermore, upon the success of the fight, he identifies land reform as one of the first elements to be resolved by successful fighting insurgents.[535]

Land is always an intensely complex issue, even in developed and relatively peaceful states. It is the ultimate resource upon which all others depend, and consequently is bound up with legal or quasi-legal regulation of resources, ranging from rights to minerals and water to rights of access and pasture. It is often the ultimate stake across the spectrum of conflict – from tribal or clan disputes over land or water ownership, to inter-state territorial war.

In his *People's War, People's Army*, the commander of the North Vietnamese forces during both the war against the French (ending in 1952) and the war against the United States and its client South Vietnam, Vo Nguyen Giap is clear as to the importance of land as a driving

[532] As examples of very many, see Quevedo, Archbishop Orlando B., 'Injustice: the root of conflict in Mindanao', address to 2005 Philippine Bishops' conference; 'Injustice not poverty the cause of Boko Haram insurgency', Pointblank news, quoting former Nigerian President Gowon, available at http://pointblanknews.com/pbn/news/injustice-not-poverty-caused-boko-haram-insurgency-gowon/ ; a discussion paper by the Human Development Network of the Philippines finds, discussing one of the insurgencies looked at below, that although poverty *per se* is not a cause, deprivation and injustice 'lie at the heart of armed conflict'. Deprivations include lack of water, health care, education and roadways. Injustices include rural families having no or too little land from which to make a living and being cheated or eased out of their fields. See Tria Kirkvliet, Ben, 'A different view of insurgencies', HDN Discussion Paper no 5 (2009), available at http://hdn.org.ph/wp-content/uploads/2010/07/A-Different-View-of-Insurgencies.pdf

[533] Tria Kirkvliet, 'A different view of insurgencies', p15
[534] Guevara, *Guerilla Warfare*, p57
[535] ibid., pp67, 93 and 94

issue in the strategy of the wars he fought.[536] 'The Vietnamese People's War of Liberation was a just war aiming to win back the independence and unity of the country, to bring land to our peasants and to guarantee them the right to it and to defend the achievements of the August revolution.'[537] As a statement of strategy and intention, that is clear and unambiguous. He goes on to be even clearer about the importance of land: 'The problem of land is of decisive importance.'[538] Giap's views are echoed by Eric Bergerud:

> In a traditional agrarian society, even one like Vietnam where much was changing quickly, the individual's relationship to the land is central to economic and social existence. Just as land is fundamental in determining wealth and status, it was fundamental in defining political position. Indeed more than anything else it was the land issue that brought Diem [the South Vietnamese leader initially strongly supported by the US] to ruin.[539]

What has land and land reform to do with justice? For some this may be an unnecessary question. The question here is not so much land policy itself, let alone the nature of the land or its ownership. The key issue is the ability for disputes (in this case over the crucial question of land) to be resolved in a manner that is considered appropriate. This is usually done with the use of law and the courts. For insurgents, the question is what courts make those decisions, and are the decisions concerning the apportionment of land considered to be rightly decided by the subject of those decisions? In other words, are they conducted in a 'fair' manner, the term rightly adopted by Tyler, as discussed in Chapter 1, and in a manner consistent with relevant and acceptable cultures and traditions? Failing to address these issues may cause structural problems which persist for decades or longer. In his study of the British invasion and occupation of Iraq in the early twentieth century, Toby Dodge makes clear the importance of land to the Iraqi polity: 'No policy debate was more important for the making of the Iraqi state than that over the system of land tenure and revenue.' He sees the British failure to address this matter, despite their realisation that it was the 'most important issue to be dealt with once the state's ancient systems had been put in place'

[536] Giap, Vo Nguyen, *People's War, People's Army* (Hawaii University Press, 2001; reprint of 1961 edition)
[537] ibid., p27
[538] ibid.
[539] Bergerud, Eric, *The Dynamics of Defeat: The Vietnam War in Han Nghia Province* (Westview Press, 1990), pp55–56

with 'the imposition of a land tenure system that was conceptually incoherent for the state' as a major cause of problems that arguably subsist as a root cause of conflict – and indeed insurgency – in Iraq to this day.[540]

Similarly, the British failure to deal properly with the serious issues of land tenure and ownership, to the extent that Western notions of ownership were appropriate, was a very great contributory cause in the Mau Mau rebellion in 1950s Kenya. The war was fought, more than for any other reason, against land appropriations. For a people whose very identity and life was wrapped up around land, what was perceived as the theft of land struck deep. One Mau Mau fighter said this:

> [We were] told that we were fighting for our land, the land of the Kikuyu, which had been taken by the white people who had taken it for themselves. They could do whatever they wanted with the land. A white man could come and declare land for miles as his, without having to ask for anyone's permission or buy it from us ... we could see that we were being oppressed, because when something that belonged to you had been taken by someone else, and then you are treated like slaves on the land that once was yours, you're bound to feel angry about it, aren't you?[541]

For the settler community in Kenya, the land problem had been resolved once and for all by the Carter Commission, which found that the Kikuyu population, who were the main victims of land appropriation by white settlers, had plenty of land upon which to settle. In fact, this was 'a preposterous suggestion'.[542] The Commission's report, which 'provides a remarkable insight into native mentality', purported to examine all 'native claims'.[543] Clearly, however, it was more focused on an examination not of the validity of claims, but of the needs of Kikuyu tribesmen who had been displaced onto reserves. There is much focus in the report on

[540] Dodge, Toby, *Inventing Iraq: The failure of nation building and a history denied* (Columbia University Press, 2003), pp101, 106, 104; Dodge places great emphasis on the influence that the Indian experience of rule had on the British administrators in Iraq (see his Chapter 6).
[541] Mau Mau fighter interviewed by Caroline Elkins; Elkins, *Britain's Gulag*, p74
[542] UK Colonial Office, *The Kenya Land Commission Report* (April 1934), available at http://www.scribd.com/doc/74835533/CAB-24-248-The-Kenya-Land-Commission-Report-1934, p106
[543] Kenya Land Commission Report covering memorandum para 3

recommendations for better land use.[544] The central issues of the validity of the policy as a whole were not addressed.

There was a very mature and highly developed jurisprudence in British East Africa, and Kenya in particular. The *Journal of African Law* for the period contains extensive law reports and articles on matters of succession, tax, contractual disputes and ordinary crime.[545] There is no discussion – and nor are there any law reports – of matters affecting the really central areas of dispute in Kenya at the time. No articles appear on land tenure in Kenya, and nor are there any reports dealing with land disputes. It is worth mentioning at this point also that there is no discussion of any of the obvious legal questions arising out of the legally fraught areas of administrative detention, with the implications of habeas corpus disputes, at the very least. Nor are there any evident law reports dealing with cases of any kind brought between Africans and settlers on appeal: this would indicate either that such cases were simply not brought, or that everyone was content with the results, a highly unlikely situation. Indeed, the first article published in the *Journal of African Law* dealing exclusively with courts in Kenya appears in 1961. That article concerns only the law and practice of the 'African Courts' in the country. Customary courts of first instance were very common in most African countries under British colonial rule – a facet of the 'Dual Mandate' approach taken by many colonial powers, which will be looked at in the next chapter.[546] In any event, by definition their jurisdiction did not apply to Europeans, who would have been the defendants in any action for the recovery of land.

The issue of land was arguably the key driver of the entire Mau Mau rebellion. As Caroline Elkins put it, 'Feeding the detainees' anger was the perennial issue of land.' She goes on to quote a British official:

[544] UK Colonial Office, *The Kenya Land Commission Report*, Chapter XIV, p145
[545] *Journal of African Law*, Volumes 1–3, covering 1954–59, available at http://www.jstor.org/action/showPublication?journalCode=jafricanlaw
[546] Tennent, J.R.M., 'The administration of criminal law in some Kenya African Courts', *Journal of African Law*, 5 (Autumn 1961), available at http://www.jstor.org/discover/10.2307/744715?uid=3738032&uid=2129&uid=2134&uid=2&uid=70&uid=4&sid=21102551560113

> The principal underlying idea of all detainees [in the rehabilitation camps] is still that their fathers' land was stolen by 'government' and that no compensation has ever been paid.[547]

The official suggests the production of a booklet to inform aggrieved Kikuyu about the Land Commission report (the 'Carter Report') and its conclusions. This was unlikely to suffice. The absence of any adequate means of dispute resolution for land issues – or any means considered fair by the aggrieved population – was therefore key to providing a cause for the insurgent groups fighting the British in Kenya, over and above any notion of independence or other political drivers.

Land is at heart a *legal issue*, and as a driver of insurgency – and therefore as a potential weapon against insurgents – it has been largely ignored. Insurgent legal means, however, can provide them with an opportunity to exploit this lacuna in counterinsurgent strategy. As we will see, the question of land ownership was very much the driving issue in Ireland, the locus of arguably the most successful of all anti-colonial insurgencies. In Afghanistan, the question of who owns the land and how that ownership is altered is an issue under-prioritised by counterinsurgents, in favour of more apparently immediate concerns, such as state punishment of crime. Nowhere was the insurgent tactic of co-opting land as both a casus belli and a vehicle for extending their influence in an effective vacuum of legitimate state resolution of land issues more evident than in the Ireland of the late nineteenth and early twentieth century.

Early twentieth-century Ireland

In the mid-nineteenth century, the movement for independence shifted from what passed as the battlefield to the more low-key arena of agricultural unrest. The struggle for land reform began to take on a nationally recognised form at the same time. It was in this arena that most physical resistance occurred. Landlordism and rent had become a key driver of resistance.

Prior to the extension of *de iure* English rule throughout the island of Ireland, with its attendant common law courts, most of Ireland had fallen under the jurisdiction of what

[547] Memorandum from Greaves to Askwith, 'Perkerra Rehabilitation Camp/Marigat Works Camp – monthly report by community development officer in charge', 31 January 1957, quoted by Elkins, *Britain's Gulag*, p317

were called the Brehon laws. The extent to which use of the Brehon laws continued de facto in the form of custom, even until the late nineteenth century, is a matter of debate. If it did continue, it would have been very much at the level of informal usage, rather than through the establishment of what became known in other contexts as 'shadow courts'.[548] Certainly they operated as a useful instrument for advocacy of a strong Irish national legal tradition. Equally certainly, the extent to which they did operate practically acted 'to undermine the operations of official law'.[549]

During the later decades of the nineteenth century, the struggle for wholesale land reform took the form of so-called 'land wars', involving cattle rustling. One form of passive resistance became known as the 'unwritten law' and did, in due course, develop into something like a shadow legal system in the form of the Land League Courts. This grew out of the 'Irish National Land League', a formal movement founded in 1879 with the aim of returning land owned and controlled by largely absentee landlords to those who actually worked it. This organisation united many disparate groups agitating for reform under one banner. It was not at heart a violent organisation. Its president was the doyen of the Nationalist movement at the time, Charles Stewart Parnell; organised or subversive violence could not be tolerated at a time when it was thought highly likely that 'home rule' would be awarded. The role of the Land League, composed as it was of committees supported by its own courts – the 'Land League Courts' – was central not only to the process of agitation for reform, but also to governance itself. There were well-regarded commentators who seriously considered the Land League to 'have established a polity capable of replacing the colonial state and [to have been] accepted by many as the legitimate political authority, the source rather than the breaker of law'.[550] This was seen by many to have the attributes of what, in today's terms, would be known as legitimacy. In other words, in all but name it was a highly effective, insurgent shadow state.

[548] Laird, *Subversive Law in Ireland*, p22

[549] ibid., p21
[550] ibid., p36

Arthur Griffith, founder of Sinn Fein, wrote a pamphlet ostensibly about the Hungarian struggle for independence 'The Resurrection of Hungary',[551] but with strong parallels with the Irish situation.[552] In it, he advocated passive resistance and non-compliance with British state institutions and refers to so-called 'arbitration courts' envisaged by the great Irish politician Daniel O'Connell. When such courts were, in due course, established and operating, particularly in the period between the Easter Rising of 1916 and the beginning of the Irish War of Independence in 1919, the 'punctilious legalism'[553] of the British combined with a pragmatic approach to form the view that arbitration courts were essentially legal within British law, as will be seen below. The view was taken that they were simply an extension of accepted forms of what was, at the time, known as 'party autonomy' or private arrangements along the lines of what would today be called mediation.

That notwithstanding, the courts acted, as Griffith had intended, to subvert and supplant the established courts. They were the forerunners of the far more subversive and effective Republican Courts, and they grew out of the need to ensure that disputes over land were resolved in a manner considered by the litigants generally to be fair and therefore legitimate.

Contemporary Afghanistan

The Asia Foundation annual Survey of the Afghan People provides a very useful insight into attitudes towards all aspects of life in Afghanistan. In 2011, it found that around 21 per cent of disputes which had been taken outside the community involved land: 'Disputes over land have regularly been the most common reason for communities to seek dispute resolution.'[554]

[551] Griffith, Arthur, 'The resurrection of Hungary' (1904), available at https://ia600204.us.archive.org/2/items/resurrectionofhu00grifiala/resurrectionofhu00grifiala.pdf
[552] In this context, the Hungarian rebels of 1848 had set up 'arbitration courts' to compete with the Austro-Hungarian 'state' courts
[553] Foxton, *Sinn Fein and Crown Courts*, p193

[554] Asia Foundation, *Afghanistan in 2011: A survey of the Afghan people*, available at http://www.asiafoundation.com/resources/pdfs/TAF2011AGSurvey.pdf p136

It also seems clear that land disputes are a direct driver of recourse to 'insurgency' in southern Afghanistan, as well as a vital driver of conflict. There are good quantitative data from Afghanistan,[555] derived from disaggregated survey data,[556] which amply sustain these assertions. There is certainly no lack of highly informed discourse on the issues of land tenure in Afghanistan and the problems it causes.[557]

Traditionally, conflicts in the Pashtun lands have been over *zar*, *zan* and *zameen* (land, gold and women):

> In the politically fragile rural Afghan landscape, conflict over land and water resources has become a driver of instability ... continuing land conflict not only threatens efforts to alleviate poverty and rehabilitate the rural economy, but also undermines the Afghan state's efforts to stabilise insecure districts … [It] is a symptom of the weakness of rule of law and a driver of political instability, civil unrest and corruption so further eroding citizens' incentives to act within the law.[558]

The countermeasures available to combat the proliferation of land disputes are the same in any culture and revolve around the accurate maintenance of acceptable, impartial records with suitable and accepted systems of dispute resolution, be they courts or other community-based solutions. This is a vast subject in itself, worthy of thesis after thesis. However, it is enough for the moment to state that awareness of the central importance of this question to the Afghan economy, and indeed Afghan politics, has come lamentably late to the nations involved in the counterinsurgency there. Whether this is due to what we will call in Chapter 4 'the problem of knowledge' – essentially ignorance of local conditions – or damaging overemphasis on 'security' issues, such as what in the West we call 'crime' (or indeed elements of both) is not clear.

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[555] Asia Foundation, *Afghanistan in 2013: A survey of the Afghan People*, available at http://asiafoundation.org/resources/pdfs/2013AfghanSurvey.pdf

[556] Raw data acquired on author's request from Asia Foundation, February 2014

[557] See the extensive list of reports by the Afghan Research and Evaluation Unit at http://www.areu.org.af/EditionDetails.aspx?EditionId=495&ContentId=7&ParentId=7, for example: Deschamps, Colin and Roe, Alan, 'Land conflict in Afghanistan: Building capacity to address vulnerability', 2009, available at http://www.areu.org.af/Uploads/EditionPdfs/918E-Land%20Conflict-IP-web.pdf; Wily, Liz, 'Land governance at the crossroads', October 2012, available at http://www.areu.org.af/Uploads/EditionPdfs/1212E%20Land%20Reform%20I%20BP%20Oct%202012.pdf

[558] Mason, *Rule of Law in Afghanistan*, p205

In late 2012, I was sent an essay produced for private distribution by Paul Davis, a former 'stabilisation officer' in southern Helmand.[559] The paper is an attack on current ideas about 'stabilisation'. It argues that they are little more than self-delusion, especially in an Afghan context. Davis wrote extensively about the endemic corruption in the Afghan government and security forces. He says this about the issue of land:

> The longer I have been here the more fundamental this issue has appeared. It is a crucial, enduring conflict driver and source of instability and yet it remains unresolved, untouched and parked as being too difficult.[560]

He goes on to outline the history of Helmand over the previous five decades. It is a history in which land and land use, as with every other rural community, is absolutely central. As in Kenya and rural Ireland, the way in which the land is used and held forms a deep, central cause of conflict. In my own period as a justice advisor for the British mission in the recent Helmand campaign, the land issue cropped up again and again, from the problem of refugees taking land that had been allocated to the government in the late 1980s, to constant (often violent) disputes over the ownership of commercial or agricultural property. From the macro to the micro, land was central. This was important throughout Afghanistan, but in Helmand, with its important agricultural resources and potential, the land issue had become absolutely crucial.

Taraki decree number 8 of 1978 ('Law number 8' as it is very commonly known) was introduced by a communist government as a measure to regulate the holding of land and was intended to give land to families that had previously been landless sharecroppers.[561] The reform was arbitrary and poorly thought out. One militia leader told a former military officer and cultural advisor, Michael Martin, that 'the mother of problems we have now is the land redistributions [at that time]'.[562] These land conflicts overlaid those from the 1950s, feeding the tribal and group rivalry. The details of these land conflicts are long and

[559] Davis, Paul, 'A bright shining narrative', Private distribution, 2012. The reference in the title is to an iconic book on the Vietnam War on the life of a former soldier who becomes disillusioned with ideas of 'pacification'.
[560] ibid.
[561] Martin, *Intimate War*, pp43ff. This law 'outlined a programme of land redistribution, according to which all holdings over thirty *jereebs* were to be given out in packages of six *jereebs*. This was not enough to support a family of ten'.
[562] ibid., p43

involved.[563] For present purposes, it may suffice to summarise them as involving extensive land theft by certain tribal and narcotics interests – some with stronger links to the government than others. Several cases of such land theft or extortion by government officials against landowners were outlined to me during my time in Helmand as justice advisor in that province.[564] All of them involved violence of greater or lesser degree of intensity. Entire quarters of the capital Lashkar Gah were appropriated from owners who had fled the country and reallocated to others with connections.

Very frequently in conflicts examined in this thesis and elsewhere, land and the controversies attached to the laws regulating its ownership have been key drivers of the insurgencies. In Helmand, it has been apparent to many observers that Law number 8 has been a festering source of conflict for the three decades since it was promulgated in 1978.[565] There is evidence of a lack of awareness of the profound, fundamental importance of land to insurgencies in predominantly rural cultures.

Michael Martin details how Law number 8 has continued to drive conflict in Helmand right up to the present day, interfering as it has with deeply entrenched social systems. This was not an obscure issue on which a few scholars should have been free to discuss matters and pass judgment; it was directly relevant to a very great proportion of landholders in Helmand. Indeed it was a matter of common conversation. When I asked a Helmandi official in 2007 what particular legal problems might be a cause of conflict in Lashkar Gah, the official replied that the dispossession in the 1980s of an entire community of refugees who were now returning from Pakistan and living in an already inhabited area of the town was causing problems that the Taliban were exploiting.[566]

Yet there was never any move on the part of the Western powers to initiate reform on any scale of this crucial provision. As Paul Davis, quoted above, said, it was 'parked as too difficult'. While at root there was a deeper problem at play in the Western, and particularly

[563] For a full account see ibid.
[564] For a full example see the Juant Case outlined in Ledwidge, 'Justice in Helmand'
[565] Cf inter alia Martin, 'War on its head'; Davis, 'A bright shining narrative'; Ledwidge, 'Justice in Helmand'
[566] Conversation with Head of Education of the Helmandi Provincial Government. The area of the city concerned is called Mukhtar. From discussions with British military officials recently in the country, I have been unable to determine whether this issue has been addressed

the British involvement in Helmand – a lack of understanding of *all* the conflict dynamics – this was certainly an area where progress could have been made, or at least attempted. To have done so would have demonstrated an awareness of the necessity to look at the conflict though legal eyes, as well as military. This awareness was largely absent. By way of anecdotal evidence, when I asked who owned the land on which the UK Provincial Reconstruction Team had been billeted, no-one in the large camp seemed to know. In another case, the journalist Ann Jones reported that US forces had built a suspension bridge across a river in the East of Afghanistan at a cost of a million dollars. They had not secured any land rights, and so no roads led to the bridge, which remained unused.[567]

The existing problems involving the key issue of land in Afghanistan were exacerbated by recent government actions. The Government of Afghanistan 'claims to own 86% of the land of Afghanistan and appears to be intent on asserting its claim to as much land as possible'.[568] Clearly this is seriously contested by those who owned the land previously. Current formal governmental procedures for settling land disputes are regarded as complex, corrupt and lengthy. In contrast, with its own laws and procedures, the Taliban offers '1) Protection from GIRoA [Government of the Islamic Republic of Afghanistan] laws and procedures and 2) predictability.'[569]

Is the case being outlined here that land disputes are a driver of insurgency? To a certain extent, yes. However, this is especially the case when mechanisms for the resolution of disputes over land are absent *or ineffective.* The argument being made here is that a lack of fair dispute resolution, specifically over land, can (as Guevara and Galula both assert, though from very different positions, as insurgent and counterinsurgent, respectively) be a major factor in laying the ground for insurgency. The roots of insurgency are complex and of course go well beyond disputes over land or notions of justice, important as these may be. It is clear that the lack of adequate means of resolving land disputes in Kenya contributed greatly to the causes of revolt there in the 1950s. In Ireland, land was, if not the dominant

[567] Jones, Ann, 'In bed with the US Army', Tom Dispatch, 11 August 2014, available at http://www.tomdispatch.com/blog/175879/best_of_tomdispatch%3A_ann_jones%2C_in_bed_with_the_u.s._army

[568] Mahendrarajah, 'Conceptual failure', p111

[569] ibid., pp111–112

issue, then certainly a major issue, and the development of the 'arbitration courts', which themselves grew out of the Land League Courts laid the foundations for the far more strategically effective Dail Courts, which in turn (as will be seen) provided a major asset for the insurgents of the Irish War of Independence.

Acting to resolve such problems, in terms of both passing laws and, more importantly, implementing them, provides a major support for insurgent legitimacy. When the Taliban was in power from 1996 to 2001, it passed and implemented a series of land laws which 'benefited Pashtun tribals and remain popular and valid ... they are a key part of the Taliban's programme'.[570] At least of equal importance is the notion that judgments reached by Taliban judges will be enforced. For having an accepted legal code is one thing, but the utility of any legal system rests on the ability of those administering it to enforce its decisions. In the Ireland of the early twentieth century and Afghanistan today – and indeed in other working societies – formal dispute resolution is achieved through the institution of courts. In the early twentieth century, Arthur Griffith, the founder of Sinn Fein, said:

> I say to my countrymen as the *Nation*[571] said to them in 1843, 'you have it in your power to resume popular courts and to fix laws and it is your duty to do so ... it is the duty of every Irishman to himself, to his family, to his neighbour, his boundless duty to his country to carry every dispute to the arbitrators and obey the decision'.[572]

Griffith pointed out correctly that such courts were in fact 'legal and their decisions have all the binding force of law when the litigants sign an agreement to abide by them'.[573]

Passing laws is one thing; adjudicating those laws in courts is another. Equally important, however, is the ability to *enforce* the judgments that such courts hand down. In all the cases mentioned above, from Mao's China to contemporary Afghanistan, a key element and measure of shadow governmental control is the ability to settle land disputes and ensure that those settlements last and do not provide a medium for further internal conflict.

[570] ibid., p104
[571] An Irish Nationalist newspaper of the period
[572] Griffith, *Resurrection of Hungary*, p163
[573] ibid., p93

The purpose of this section was to show the potential of one aspect of civic life – the central one of land – to provide not only a cause for insurgents, but also a vehicle for them to act as agents of dispute resolution – whether in a Western setting, albeit agrarian, such as Ireland in the early twentieth century, or a tribal setting, such as contemporary Afghanistan. How insurgents realise their dispute resolution in the form of courts is the topic of the next section.

Section 2

Insurgent courts

We now turn to look at some historical examples of insurgent or revolutionary courts. These examples are arranged in ascending order of organisation and complexity. Even in the less well-developed examples, none of them might be described (except by their enemies) as simply 'kangaroo courts'. All had some level of sophistication, dependent not only on personnel, but also (to an extent) on the security situation they faced. Clearly, the more secure a group was in its territory, the more entrenched and developed a system of shadow government might be, with its crucial component of courts both as agents of security and as dispute resolution fora.

As was pointed out above, in his classic work *Guerrillas* Jon Lee Anderson took the view that rebels use courts as 'revolutionary rehearsals of the exercise of the power they hope to wield one day on a larger scale'.[574] He visits several revolutionary movements: the Mujahedin of 1980s Afghanistan, the Karen National Liberation Movement, the Polisario Front of Western Sahara, the Occupied Palestinian Territory of Gaza and the Farabundo Marti National Liberation Front (FMLN) of El Salvador.[575] With the exception of the Polisario Front (see below) all these movements were involved in an active contest for territory (and people) with the larger and more powerful conventional forces of states which were, if not necessarily strong, then at least as militarily capable as the insurgents. In other words, none of them occupied territory of their own *securely* for any length of time.

[574] Anderson, *Guerrillas,* p172
[575] See also Sivakumaran, *Law of Non-International Armed Conflict*, p555

In addition, as Sandesh Sivakumaran points out, the Algerian insurgents of the FLN in the Algerian War of Independence ran courts,[576] as did those of Biafra. In today's insurgent world, the Marxist Naxalites of India, the Free Aceh Movement,[577] the Sierra Leonean Revolutionary United Front (RUF), the Kosovo Liberation Army,[578] the National Liberation Army (ELN) and FARC of Colombia, and the South Sudanese Sudan People's Liberation Movement (SPLM) (prior to winning independence)[579] have run courts of greater or lesser sophistication.

The FMLN of El Salvador provides a sound example of why such courts are set up. As Anderson points out,

> … it was necessary to impose order and discipline so that everyone, the guerrillas and civilians knew where the new boundaries lay. The FMLN moved swiftly implementing a strict system of justice ... mostly the system has worked and in marked contrast to the government forces the FMLN's combatants have earned a reputation for being well-disciplined.[580]

Anderson stresses that 'the administration of justice is a crucial aspect of [the FMLN's] revolutionary programme'. In other words, to some degree the nature of the justice imposed contributes to the strategic narrative of the movement. The case of the FMLN provides an instructive illustration of how justice was used to support a wider narrative.

The FMLN was essentially a classic South/Central American Marxist 'liberation' movement. It was formed in 1980 and fought throughout that decade, prior to a ceasefire and re-emergence as a political movement in 1991. Throughout its existence, the narrative of

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[576] ibid., p555 fn322. See also the classic film *Battle of Algiers* featuring a marriage between two insurgents, presided over by an official who seems to be a judge. Apparently a brief and unremarkable scene, its implications are great, because what is happening is that the new state, represented by the insurgent officials, is deciding and validating the institution of marriage

[577] ibid., p554

[578] ibid., p554. It was the author's observation as a 'ceasefire verifier' during the Kosovo War prior to the NATO intervention that there were insurgent courts in Kosovo, but they were run by, and drew their legitimacy from, the shadow government run by the Lidhja Demokratike e Kosovës (LDK) political party and its allies. The Kosovo Liberation Army – drawn from a different political tradition – did not run courts or any other civil infrastructure. There is little or no literature on this

[579] The SPLM judicial system was clearly impressive, consisting of a full panoply of first instance, appeal and supreme courts founded on an extensive legislative basis. See http://www.nyulawglobal.org/globalex/South_Sudan.htm

[580] Anderson, *Guerrillas*, p187

discipline and compliance with international law was a constant theme. In a book published by the movement in 1988, internal discipline was stressed both nationally and internationally.[581] For example, when two wounded and captured US servicemen (the United States was heavily involved militarily in the Salvadoran Civil War on the side of the military government) were killed by an FMLN fighter, the FMLN declared that they 'admitted to what happened and said that those responsible have been charged with committing a war crime by violating the FMLN's Code of Conduct and the Geneva Conventions'.[582] A trial was convened that was open to international observers, who were not happy that the standards of fair trials had actually been met – for example, access to the identities of advocates and jurors.[583]

Speaking more generally about insurgencies, Kalyvas has pointed out that:

> [P]olitical actors face three distinct population sets: populations under their full control; populations they must share with their rival; and populations completely outside their control. These three situations constitute two general types of sovereignty: *segmented* and *fragmented.* Sovereignty is segmented when two or more political actors exercise full sovereignty over distinct parts of the territory of the state. It is fragmented when two political actors (or more) exercise limited sovereignty over the same part of the territory of the state.[584]

Among current insurgencies, segmented sovereignty might be epitomised by the Western Sahara Polisario Front or the Islamic State in Syria and Iraq in mid-2014; fragmented sovereignty by the Taliban in Afghanistan.

We turn now to look at some examples of currently operating insurgent courts, before embarking on a more detailed examination of two key instances where the operation of courts has had a profound strategic effect: the Republican Courts of the Irish War of Independence and the contemporary Afghan Taliban. The section ends with a brief look at the Islamic State and insurgent courts in the current Syrian Civil War.

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[581] FMLN, *Legitimacy of Our Methods of Struggle* (Inkworks Press, 1988)
[582] Inter-American Commission on Human Rights Periodic Report for 1990–1991, Chapter VI 'El Salvador', available at http://www.cidh.org/annualrep/90.91eng/chap.4a.htm
[583] For a discussion of this, see Sivakumaran, *Law of Non-International Armed Conflict*, p552–553
[584] Kalyvas, *Logic of Violence in Civil War*, pp89–90

Western Sahara

In North Africa, the conflict over the area South of Morocco and now known as Western Sahara began in 1975 with the withdrawal of Spain, which handed the territory over to Morocco. A resistance movement was formed by the indigenous Sahrawi people and became known as the Frente Polisario. In due course, military pressure from the Moroccan armed forces drove the Frente Polisario from the physical territory of Western Sahara. Since 1991, when a ceasefire was negotiated with Morocco, most of Western Sahara has been under Moroccan control, although with a UN presence.[585] The Sahrawi Republic exists as a virtual entity now in Eastern Algeria.

The Sahrawi Republic, run by the successors to the Frente Polisario is, to all intents and purposes, a state with all the formal accoutrements, including a well-developed court system, with first instance, appeal courts and a supreme court. Like other states in exile, it considers itself to be the legitimate government of the entire territory of what is now Western Sahara. Its court system is, at least formally, well developed and comparable in structure to any other state system in the region.[586]

Philippines: Communist Party of the Philippines and New People's Army

The communists of the New People's Army (NPA) have been fighting in the Philippines since the heyday of Marxist 'people's movements' in the late 1960s. The foundation documents speak clearly of the need for courts to found the new state advocated by the movement. Such courts exist from the lowest municipal level to the higher political levels.

Arbitration courts exist at the *barrio* or local level. The Communist Party of the Philippines (CPP) has set up some local-level arbitration courts:

> Based on our experience, arbitration has become an effective means of uniting the people for the revolution. This is because the people see that it is possible to obtain

[585] The mission is known by its acronym MINURSO

[586] Periodic Report of the Sahrawi Arab Democratic Republic to the African Commission for Human and People's Rights (October 2001), available at http://www.achpr.org/files/sessions/55th/state-reports/2nd-2002-2012/periodic_report_sahrawi_eng.pdf paras 56–60

> justice even while we are still advancing our struggle ... handled by the organs of political power under the guidance of the Party and its representatives. Serious criminal cases that need longer processing and preparations are referred to the people's court.[587]

The guiding principle is asserted to be 'social justice', and even in the rather dated Marxist terms of the article quoted above, it is clear that the arbitration courts are competing (or are said to be competing) with the Philippines state courts on the basis that justice is cheap and quick.

Extensive reference in the documents of the CPP/NDA is made to cases brought in 'people's courts' against alleged criminals, some of whom had been acquitted for such matters as corruption in what the New Democratic Party of the Philippines (NFDP) calls the 'reactionary' state courts.[588]

The system prescribed by the 'Guide for Establishing the People's Democratic Government' posits three levels of courts – at the provincial, district and *barrio* levels.[589] A panel of three judges sits on minor cases, while a panel of nine judges handle major and complex cases, particularly those involving the death penalty.

While the operation of these courts has been extensive, and the CPP/NPA claims due process in its documents, the United Nations Special Rapporteur on extrajudicial executions – the highly regarded Philip Alston – has strongly criticised them:

> It is apparent that the CPP/NPA/NDF does impose punishments for both ordinary and counterrevolutionary crimes in areas of the country that it controls. But NDF representatives were unable to provide me with any concrete details on the operation of the people's court system. This suggests that little or no judicial process

[587] 'Nang Lydia's house: arbitration at the barrio level', Philippine Revolution Web Central, posted March 2013, http://www.philippinerevolution.net/publications/ang_bayan/20130421/arbitration-at-the-barrio-level
[588] See, for example, http://www.philippinerevolution.net/statements/20061228_garci-case-being-considered-for-proceedings-in-people-s-court-cpp where a state governor acquitted in the state courts is referred to the People's Courts
[589] NFDP Guide (October 1972) Part II, Chapter III, article 2

> is involved ... In other words, it seeks to add a veneer of legality to what would better be termed vigilantism or murder.[590]

Nepal: Communist Party of Nepal-Maoist

Courts are also an indicator of the extent to which government might be failing. Nepal was the venue for one of the most successful Maoist revolutionary movements of the late twentieth and early twenty-first centuries. Beginning its armed struggle in 1996, in due course the Communist Party of Nepal-Maoist (CPN-M) took power locally in many areas of Nepal, eventually being permitted, following a ceasefire in 2006, to take part in elections. Indeed in 2008 it won a majority and took power.[591]

As in the Philippines (and indeed elsewhere in the Maoist and wider revolutionary world), courts were developed nationally. As elsewhere, they were used as tools of control, indicators of power and a means of undermining government legitimacy. They were part of the wider administrative 'shadow state' success of the Maoists throughout the Nepalese countryside, and exploited the failures of the state itself. As the BBC reported at the time, 'The Maoists regard their court system as the heart of their "People's Government", running in parallel with the official government through much of the country.'[592] An article in the *Economist* (also from late 2006) observed one such court handling dozens of cases a day:

> People's courts, which have mushroomed across Nepal in recent months, are only one sign that the country's Maoist rebels are getting more organised – and that the government is failing. While Judge Chettri passed judgment in a humble shack, Kohalpur's brand-new courthouse was closed for a two-week holiday.[593]

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[590] UN General Assembly, 'Report of the United Nations Special Rapporteur on Extrajudicial, summary or arbitrary executions Phillip Alston from the Mission to the Philippines' (16 April 2008), available at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=484d2b2f2&skip=0&advsearch=y&process=y&allwords=&exactphrase=&atleastone=&without=&title=special rapporteur extrajudicial executions&monthfrom=&yearfrom=&monthto=&yearto=&coa=&language=&citation=

[591] The CPN-M is now called the 'Unified' Communist Party of Nepal- Maoist' - UCPN-M

[592] BBC, 'Parallel justice Maoist style', BBC Online, 14 October 2006, available at http://news.bbc.co.uk/1/hi/world/south_asia/6048272.stm

[593] *Economist*, 'Judged by the people: the Maoists grow stronger', 5 October 2006, available at http://www.economist.com/node/8001629

Courts acted as a key element in the objective of filling a gap left not only by what was perceived as a corrupt and inefficient state, but by a hiatus in the armed struggle. As people awaited the outcome of a prolonged negotiation process towards the end of the insurgency, following a ceasefire 'the state is hardly functioning. Many policemen, for example, are sitting on their hands rather than enforcing the law until they see what kind of government will emerge.'[594]

Once again, by contemporary standards, these 'kangaroo-type court' procedures were rough and ready, with often only rudimentary procedural safeguards.[595] Judges were trained for only a few days, although many cases were anyway considered to be a matter of 'common sense'.[596] The courts attracted a good deal of criticism from human rights groups and authorities – understandably so, given the savagery with which they dealt with those found guilty of crimes, with punishments often involving prolonged beating.[597]

By 2006, Maoist rebels controlled most of the Nepalese countryside. Following a ceasefire, elections were held and the CPN-M took power, in due course sharing that power with other parties.

All the above groups are either still in existence (in the case of the Karen National Liberation Movement, CPP/NPA and Polisario) or eventually took power (FMLN, CPN-M). It is perhaps instructive that neither the Mau Mau nor the MPLA in Malaya succeeded in their primary objectives, both being suppressed by the British, as we saw in the previous chapter. Neither was in possession of any effective shadow state system or any effective dispute resolution mechanisms approximating to courts. The question as to whether this is symptomatic of failure or partially causative is a tempting one; attempting to answer it, however, may not be fruitful. The MPLA, Mau Mau and the Tamil Tigers in Sri Lanka (the last of which had

[594] ibid.
[595] See comment by Kunda Dixit, Chief Editor of the *Nepal Times* in BBC, 'Parallel justice, Maoist style'
[596] ibid.
[597] Ibid.

perhaps the most sophisticated courts system of any insurgent group)[598] were defeated militarily: not by superior governance, but by superior firepower and the ability to apply intense coercive force. It is difficult to see how the possession of a working courts system, however sophisticated, could change that dynamic.

While possession of a working shadow state system, including a courts system, may not be sufficient for victory (or, more accurately, success), can the argument be made that it is necessary? To begin to attempt an answer to this, we now turn to arguably the most successful of all insurgencies in recent history. To do so we return to the British Isles.

Ireland: 'The first modern insurgency'[599]

In the previous chapter, the use of 'rupture strategy' by Irish revolutionaries in the Irish War of Independence was briefly examined. The Irish were pioneers in exploiting weaknesses in the incumbent court system. They were also innovators in the use of *their own courts* as weapons.

The Irish War of independence (1919–21) occurred nearly a century ago. However, a study of the way in which this struggle was conducted in the realm of 'lawfare' is entirely germane to the present thesis. In the words of a leading expert on insurgency, Ian F.W. Beckett, the war was 'A true forerunner of modern revolutionary groups in terms of its politically inspired campaign.'[600] That campaign was sophisticated and multi-layered. Its military aspects have been looked at closely, and they may have influenced insurgent leaders as diverse as Ba Maw in Burma and Menachem Begin in Israel.[601] However, the lawfare techniques evolved during that conflict were arguably of equal significance to the military struggle. The system is well worth examining in detail.

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[598] For a fine account of the sophistication of the courts system of the Tamil Tigers' state, see Sivakumaran, 'Courts of armed opposition groups', pp493ff. For a detailed account of this courts system from a senior Tamil official, see Kamalendran, C., 'The inside story of "Eelam Courts"', *Sunday Times* (Sri Lanka), 14 November 2004, available at http://sundaytimes.lk/021208/news/courts.html

[599] William Kraus in 'The Encyclopaedia of Insurgency and Counterinsurgency' (ed Tucker) at p 276

[600] Beckett, Ian F.W., *Modern Insurgencies and Counter-insurgencies* (Routledge, 2001), p16

[601] ibid., p17

The Ken Loach film *The Wind That Shakes the Barley* did not attract the approval of the establishment. It was criticised for portraying the British as sadists and the Irish as romantic, idealistic resistance fighters who take to violence only because there is no other 'self-respecting course'.[602] That may well be so. It is also a picture of an 'insurgency' from the insurgent's perspective – in this case the IRA. One scene from the film presents a key element of the Irish War of Independence. In that scene, set in what appears to be a village hall or school, a court has been set up. Its function is not to decide the fate of 'traitors' or collaborators. What is being decided is whether a particular debt should be paid. Putting aside the political aspect of this particular debt – it is owed to a loan shark who bankrolls the local IRA unit, which is trying to ensure that it is paid – this kind of case is the meat and bread of courts all over the world every day.

What is being depicted is a key element of the IRA's campaign to establish and sustain its authority, its legitimacy as the legitimate government of Ireland.

The IRA's judicial strategy 1916–22

As observed above, the 'arbitration courts' had been in operation since the late nineteenth century, and were successors to the Land League Courts. After the 1916 Easter Rising, the British (the Unionist forces) had instituted what amounted to martial law.[603] Insurgents who had been involved in the Easter Rising were tried under martial law at courts martial; 15 were executed.[604] The effect of these executions, incidentally, was to turn much of the previously pro-government Irish population against the government. The use of courts martial was treated as an opportunity for Irish Nationalist lawyers to challenge their jurisdiction and legality on the basis that the court hearings were wrongly held in secret.

In November 1918, elections took place throughout the UK. There was an overwhelming majority of Sinn Fein MPs returned from Ireland, and these MPs decided to boycott the London Parliament and set up their own parliament in Dublin, known as the Dail Eireann.

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[602] Heffer, Simon, 'Why does Ken Loach loathe his country so much?' *Daily Mail*, 30 May 2006

[603] Technically there were two concurrent jurisdictions. One was founded on regulations made under the Defence of the Realm (Consolidation) Act 1915, the other power was a residual power accorded to the military in common law. It was the former which was brought into operation. The first test case concerning the detention and trials of Gerald Doyle and Cornelius O'Donovan was lost (see Foxton, *Sinn Fein and Crown Courts,* pp117ff)

[604] Although 93 were sentenced to death by court martial, the other sentences were commuted

Meanwhile the nascent IRA had begun to intensify action against British security forces. Local initiatives had given rise to a new brand of locally organised land courts – a reaction to the wave of agrarian land disturbances, some of them acting 'in a haphazard and slipshod manner with grave possibilities of irregularity', according to the committee set up by the Dail (itself, of course, a 'shadow' structure) to design a new courts system.[605] Following a relatively full assessment of the 'English courts' and the challenges of formalising the already existing insurgent courts, the Dail announced the formation of national arbitration courts in August 1919. In due course, these became known as 'Dail Courts'.

Setting up the new system was expensive, since all its participants were paid. In March 1920, it was assessed that the cost of the new system would amount to £113,000.[606] There was the full panoply of parish courts, with appeal lying to district courts and finally a court of appeal. Legitimacy was assisted by the fact that judges at the parish courts were elected by those over whom they would minister. There was a scale of court fees, and all litigants had to sign a declaration that they would comply with the decision of the court and not submit to any 'enemy tribunal'.[607] Coupled with this, the campaign to boycott the Crown Courts gained momentum alongside a British effort to suppress the Dail Courts by force.[608] The Dail authorities acted very quickly to deal with agitation over land issues by instituting dedicated Dail Land Courts,[609] although the speed with which the new systems were gaining momentum certainly surprised even Sinn Fein.[610] The new system of courts gained real purchase, especially when coupled with the effective withdrawal of the Royal Irish Constabulary from large parts of the country. At times there were serious derogations from regular procedure; but these were at a local level, particularly in the comparatively radical south west of the country, and were effectively a continuation of long-festering disputes.[611]

John Brayden, an Irish barrister who was fully experienced in the 'Crown Law' observed the proceedings of some of these courts and wrote about them in the *Journal of the American*

[605] The National Arbitration Courts Committee, see Townsend, *Republic*, p125
[606] ibid., p126
[607] Brayden, John, 'Sinn Fein courts in operation', *American Bar Association Journal*, 4 (September 1920), p10
[608] Foxton, *Sinn Fein and Crown Courts*, p195
[609] ibid., p189
[610] Townsend, *Republic*, p127
[611] ibid., p127

Bar Association in 1920.[612] As far as can be determined, he himself was not a Republican.[613] He describes the courts thus:

> They have tried to focus on the merits. They have, according to all accounts derived in many cases from men very hostile to Sinn Fein (Irish Republican) principles and purposes, endeavoured to an impartial justice and have surprised hardened Unionist [pro-British] practitioners by their willingness to decide in favour of an unpopular landlord against an unpopular tenant, when the facts called for such a decision.[614]

Brayden goes on to describe a number of cases brought against those who might have been expected to gain little sympathy from a Republican forum. 'The Sinn Feiners have been able to organise their courts, equip them with judges, attract the confidence of litigants and secure obedience to their decrees.'[615] It is apparent that this was not an isolated assessment.

Not only was there – to a considerable degree, if not uniformly – what might now be called 'procedural fairness' (or more importantly *perceived* procedural fairness), to the extent that, particularly in matters involving land, Unionists were often content to use the Dail Courts.[616] But the courts were able to enforce their decisions. Brayden is pragmatic about the reasons for this: no litigant gaining a judgment from a 'Crown' court would be allowed to enjoy the fruits of that judgment in peace. If the litigant chose the Sinn Fein (Dail) Court, 'she might live in peace'.[617] The courts also dealt with criminal matters: 'the Sinn Feiners arrest men for every sort of criminal offence, try them in their necessarily strictly secret courts, and fine, imprison or deport as they please'.[618] Although initially these courts acted much as the arbitration courts had – which is to say essentially with the consent of the parties (the

[612] Brayden, 'Sinn Fein courts in operation', pp8–11
[613] One of his two sons had been killed in the British Army during the First World War, the other was serving on operations in India at the time the article was written
[614] ibid., p10
[615] ibid., p8
[616] Foxton, *Sinn Fein and Crown Courts*, p194
[617] Brayden, 'Sinn Fein courts in operation', p9
[618] ibid., p10

caveat being that there was much 'encouragement' not to use the Crown Courts) – in August 1920 the Dail passed a decree giving coercive jurisdiction to the courts.[619]

By now, particularly in Nationalist areas, the courts had largely displaced the work of those of the British state. There had been, in the words of one contemporary, 'a steady encroachment of Sinn Fein Courts on the constituted domain of law'.[620] Due to their increasing reach, they began to attract business from beyond the Nationalist community. Charles Townsend relates one Unionist landowner, Lord Monteagle, taking the view that the Nationalist courts had shown 'extraordinary fairness' and had been 'extremely just'.[621]

Barristers complained to Brayden that work in the state courts had dried up by late 1920, just at the time when the British armed forces were beginning to gain some grip over the military side of the conflict. By then a combination of perceived procedural fairness, the ability to enforce judgments, threats against those who continued to use Crown Courts (thereby breaking the boycott) and the destruction of courthouses had resulted in a situation where 'Sinn Fein justice was alone available; the King's writ had ceased to run; the Royal judges still went on circuit, but their courts, guarded by police and soldiers, were empty of litigants', who had by now transferred their cases to the Dail Courts.[622] Conor Maguire, a future Chief Justice of Ireland, remarked in a Radio interview, echoing those complaints to Brayden, that 'In the end, in 1919 we [the Dail Court in County Mayo] took all the business of the county [civil] court. In 1920, we took all the business of the Assize [Criminal] Court'.[623]

As Tom Tyler puts it in *Why People Obey the Law*, 'A judge's ruling means little if the parties to the dispute feel that they can ignore it.'[624] Similarly, courts will not work if the staff or key personnel in the procedure fail to attend. Witnesses were 'encouraged' to refuse to attend court hearings. Such encouragements included outright threats, such as a notice placed outside a petty sessions in Kerry stating that anyone who attended court as a witness that day would be shot. The court was adjourned. Attacks on courts and court officials were also

[619] Foxton, *Sinn Fein and Crown Courts*, p188
[620] Letter from A.M. Sullivan, *The Times*, 10 July 1920
[621] Townsend, *Republic*, p129.
[622] Foxton, *Sinn Fein and Crown Courts*, p192
[623] RTE (Irish Radio) interview of Conor Maguire (19th January 1969) available at http://www.rte.ie/archives/exhibitions/920-first-dail-eireann-1919/289506-the-first-dail-sinn-fein-courts/
[624] Tyler, *Why People Obey the Law*, p19

common and a policy was announced that 'every person in the pay of England (magistrates and jurors, etc.) will be deemed to have forfeited his life'.[625] Concerted attacks on the court system were to have been part of a strategy following on from the failure of talks in 1921, and the order was not executed on a national scale as the talks succeeded. However, Austin Stack, the Sinn Fein minister of justice and home affairs, said in 1921 that efforts to 'empty the enemy courts' should continue during the post-agreement truce, but that it should be done 'unostentatiously'.[626]

Judges were always heavily guarded, but the more senior judges were rarely targeted. However, concerted plans were made to target these more senior judges if negotiation efforts during the truce of 1921 broke down. In any event, judges were very often in sympathy with Sinn Fein aims. While threats contributed to mass resignations, the behaviour of elements of the British security forces, as well as the pervasive use of martial law, made a significant contribution as well. One magistrate resigned in August 1920, stating as his reason that 'His Majesty's government has determined on the substitution of military for civil law in Ireland.'[627] He was joined by 148 magistrates in that month alone.

At that stage, however, politically it might be argued that the British authorities had become the insurgents, as a new authority had established itself firmly, if not immovably. There was significant opposition, of course, from what might be termed 'legal vested interests'. In a letter to the London *Times*, A.M. Sullivan, himself a barrister, though clearly sympathetic to the ideals of independence and highly critical of English rule regarded Sinn Fein as a criminal society that 'bullied' litigants into submission; no barrister 'should soil himself by lending the sanction of his participation to the performance of a body which repudiates and denounces those principles of justice which constitute his creed'.[628] Despite the somewhat chaotic military operations of the time, a moderate Irish politician, Horace Plunkett, could say that 'Order is being preserved with increasing success by Sinn Fein'[629] – a remarkable judgement from a relatively conservative man. Independence was less than a year away (it came in December 1922) and the views of Sullivan, although by no means uncommon, were

[625] Proclamation quoted in Foxton, *Sinn Fein and Crown Courts*, p181, from PRO/TS27/85
[626] Townsend, *Republic*, p338
[627] Foxton, *Sinn Fein and Crown Courts*, p185
[628] Letter from AM Sullivan, *The Times*, 10 July 1920. It was declared by the Irish Bar Council that barristers appearing before the Sinn Fein Courts were committing professional misconduct
[629] Letter to *The Times* quoted in Brayden, 'Sinn Fein courts in operation', p10

becoming irrelevant. One avowed Unionist summed up in *The Times* the effect of the Dail Courts:

> An illegal government has become the de facto government. Its jurisdiction is recognised. It administers justice promptly and equitably and we are in this curious dilemma that the civil administration of the country is carried on under a system the existence of which the de iure government does not and cannot acknowledge and is carried on very well.[630]

The courts and the 'revolutionary legality' of the Nationalist judicial strategy had acted simultaneously to subvert the state order and strengthen the authority of the Dail. The leading expert on the courts, Mary Kotsonouris, herself an Irish judge, takes the view that the Dail Courts 'operated in an ordinary way and paralleled in their proceedings and procedures those of the courts they were intended to subvert. They were the promise and proof that the time for self-government had come.'[631]

In his *Rebel Rulers* Zachariah Mampilly presents as his second (of seven) hypothesis concerning insurgent behaviour that: 'If an insurgency emerges in a state with high penetration into society it is more likely to co-opt pre-existing institutions and networks into its civil administration thereby improving governance provision.'[632] It is clear that his hypothesis is correct in the Irish case. Indeed the same seems to be occurring in Syria, and did occur in Libya. In all these cases, as Mampilly posits, the state had a high degree of penetration into society. In Ireland, however, the state had a high level of penetration to the extent that only a decade prior to the Irish War of Independence Ireland was, to all intents and purposes, a fairly settled part of the United Kingdom and its governmental systems (albeit with strong movements for devolution).

In the later conflict in Northern Ireland (1968–98) the Provisional IRA, the self-declared successors to the Irish Republican Army of the War of Independence, attempted a system of community justice, on a relatively local scale, in the housing estates and Republican

[630] Quoted in Townsend, *Republic*, p 130 (no attribution)
[631] Kotsonouris, *Dail Courts*, p5
[632] Mampilly, Zachariah, *Rebel Rulers: insurgent governance and civilian life during war* (Cornell University Press, 2011), p72

communities of Northern Ireland.[633] Ultimately, the Provisional IRA's efforts at non-state justice failed to gain purchase. Despite the IRA's regular denunciations of the authority of the British Crown in Northern Ireland, there was no effective overall civic strategy adopted by the Republicans of the late twentieth century. They set up no effective community-wide dispute resolution system. The acid test of such a system is not the number of knee-cappings of petty criminals in Belfast housing estates, but rather the bodies to which litigants turn when they require adjudication of a legal dispute. In the Northern Ireland of the late twentieth century, the answer was that whether a litigant was Catholic or Protestant, he or she would bring their dispute to the county court.

Here might be observed a link between late twentieth century Northern Ireland and the Malaya of the 1950s – or indeed the Kenya of the 1950s (for all except the Kikuyu, who in any event would bring civil disputes to the so-called 'African courts'). The law reports show from those colonies, as they do from Northern Ireland, that the forum for such disputes was not an insurgent tribunal, as might be the case in Tamil Sri Lanka, Maoist Nepal or Nationalist revolutionary Ireland, but rather the British Crown Courts.

The establishment of the Dail Courts was only one aspect of a multidimensional legal strategy adopted by the Nationalists in the War of Independence. It was arguably the first such concerted strategy, certainly in recent history. It combined the use of courts to undermine the legitimacy of the state, those courts themselves acting as levers to increase the power and reach of the Dail. In addition, they acted as indicators of that power and reach. The Nationalist strategy did not stop there, however. Certainly the major element of the strategy comprised the Dail Courts, but there was another dimension: using the Crown Courts to undermine their own legitimacy 'at home' in Ireland, in England, and indeed, with a rather modern-looking media strategy, abroad. In this, the Nationalists were probably the first successful practitioners of what was to become known as 'rupture strategy' (see Chapter 2).

[633] Monaghan, Rachel 'The return of Captain Moonlight', *Studies in Conflict and Terrorism*, 25 (2002), p48

Insurgent justice in 'ungoverned space': Afghanistan, 1979 to the present

Ireland was an integral part of a well-developed Western polity a century ago, at the time of the 'Republican Courts'. Afghanistan in the twenty-first century, by contrast, is an extremely poor, severely underdeveloped country in Central Asia. Yet despite the differences, insurgents in that country have used tactics similar to those once employed in Ireland to exploit their advantages in the operation of courts, in order to bolster their legitimacy and displace the incumbent government based in Kabul. There is nothing new in their approach. The pioneering journalist Jon Lee Anderson travelled with the Afghan Mujahedin in the 1980s and wrote about them, and indeed other groups around the world, in *Guerrillas*:

> The Mujahedin of Afghanistan give little thought to winning over the population. In this isolated and tradition-bound country, Islam and the power of the local strongman stand virtually unopposed. If the Mujahedin are dominant in an area, their word is law. And this usually means Islamic law as interpreted by them and their mullahs.[634]

He relates the setting up of a court in the Kandahar area by a *shura*, a council of elders:

> … as a necessary alternative to the Afghan regime's own discredited judiciary [this *shura*] has come to exercise the Islamic authority throughout the province, underpinning the military authority of the Mujahedin at the same time.[635]

Of course, what was done here is what is done, as we have seen, in many insurgencies: what amounts to a shadow government was set up. Itinerant mullahs delivered judgment under a tree, not only on cases related to the war, such as the division of ammunition or the delineation of areas of control of the Mujahedin. They litigated thefts, adultery and murders. Anderson concluded his account of cases heard by Mullahs in the district of Arghandab with words that may be seen as equally applicable to Taliban courts today:

[634] Anderson, *Guerrillas*, p173
[635] ibid.

> In Arghandab, the people know that if they follow the rules they will be treated fairly. There are no arbitrary punishments; nothing is meted out that is not already expected. In an Islamic land, the laws imposed by [the mullahs] are the ones the people have already learned to obey.[636]

Twenty years on at the time of writing, Arghandab remains a district that is fiercely contested by 'government' forces' (this time supported by the US) and the Taliban.

The Mujahedin success in the field of the provision of justice has been inherited in full by the more recent Taliban. After the Soviets left Afghanistan in 1989, there ensued what is popularly regarded as a period of chaos. This, at least in the south of the country, is said to have ended in 1996, when the Taliban came to power. Insofar as one can distinguish the 'Taliban' from other more opportunistic groups in places such as Helmand,[637] if they have one 'unique selling point' it is their provision of a justice system.

Part of this is based on the Taliban's reputation from their period of rule, 1996–2001. The Taliban's founding myth, as related by Abdul Salam Zaeef, the former Taliban foreign minister, goes as follows:

> The founding meeting of what became known as the Taliban was held in the autumn of 1994 ... Mohammed Omar took an oath from everyone present. Each man swore on the Quran to stand by him, and to fight against corruption and the criminals ... The Sharia would be our guiding law and would be implemented by us. We would prosecute vice and foster virtue, and we would stop those who were bleeding the land. Soon after the meeting, we established our own checkpoint ... and we immediately began to implement the Sharia in the surrounding area.[638]

No name was chosen at that stage. The next night, the BBC reported the birth of the new movement. This foundation myth may have some grounding in reality. Another version is

[636] ibid., p181
[637] For a full and informed discussion of the degree to which there is distinct 'Taliban' in Helmand, see Martin, 'War on its head'
[638] Zaeef, Abdul Salam, *My Life with the Taliban* (Hurst and Co., 2010), p65. See also Rashid, Ahmed, *Taliban* (IB Tauris, 2010), p25

'that the Taliban were created by Pakistan's ISI [Inter-Service Intelligence] and trained in ISI camps'.[639] For present purposes, it is not important what actually happened, but rather how the Taliban have constructed their narrative of justice, grounding it in what may in fact be a myth, but one which is commonly felt to be true.

I was 'justice advisor' to the United Kingdom security forces in Helmand in 2007. I recall speaking to a woman member of the Helmand provincial council who said that often, as she walked past the town stadium where, in Taliban days, criminals and other alleged malefactors were punished – often by death or amputation – she felt regret: 'At least we could walk the streets in safety then.'[640] As Clark and Carter confirm in a study of justice in Afghanistan, 'Current efforts by the Taliban to provide justice tap into the same deep desire for security and rule of law that helped attract the country to their rule in the mid-1990s.'[641]

When I deployed to Helmand in 2007, the Taliban already ran what seemed to be a relatively well-regarded system of courts. It was made clear to me very early on that the Taliban had been founded a decade earlier on a manifesto of justice, and it was a reputation that they were keen to maintain:

> A man was killed over a land dispute near Garmsir. He was arrested by police, and given a short prison sentence of six months. The victim's family were not satisfied with this response of the state. They presented the case, when the man had been released, to the Taleban in Garmsir. The case was heard by four Taleban judges, with the accused present. The judgment was that the victim's brother should have the opportunity to kill the murderer. He did, and professed himself very satisfied with the outcome.[642]

Research at the time in Helmand revealed that the Taliban of Helmand were operating a 'circuit court' system of four judges travelling the province settling cases. As the mission in

[639] Mahendrarajah, 'Conceptual failure', p100
[640] Interview by author with Helmandi member of Provincial Council, September 2007
[641] Clark and Carter, 'No shortcut to stability', p21
[642] For other cases like this and an extended version of the arguments in this thesis, see Ledwidge, 'Justice in Helmand', and Ledwidge, 'Justice and counter-insurgency in Afghanistan'

Helmand matured, these were to become known as 'motorcycle courts'. The Taliban claimed to apply real justice. In addition to the fact that the official or formal system was widely perceived as moribund and corrupt, they asserted that the constitution as it now stands is simply un-Islamic. They would remove 70 articles from the constitution, not least because it implicitly excludes the harsher features of what they suppose to be pure Quranic justice of the Hanafi School of Islamic law, informed by the extremist Deobandi (essentially Wahhabist) form of Islam.[643]

In Washir district, the application of what are (wrongly) regarded as the evidentiary rules pertaining to rape took an unusual turn:

> A woman was raped. No recourse to governmental authority was available. So the case was taken before the Taleban judges. They ruled that the necessary four witnesses for a rape case were not available and that therefore no crime could be proved. The victim's family were unhappy with this, and took matters into their own hands. They kidnapped the perpetrator and raped him themselves. In turn he brought his own rapists before the Taleban Court. The ruling was the same. He could produce no witnesses and therefore the crime could not be proved.[644]

The resident of Washir district who reported this case said that since the Taliban had arrived 'there had been no robbery or kidnappings. Indeed no crime.' The kind of justice offered by the state was not encouraging. It was clearly beset by – indeed characterised by – corruption, incompetence and what might be baldly, if accurately, described as pure criminality.[645] The Taliban had identified a key centre of gravity, a critical vulnerability, and attacked it. The 'narrative' of Taliban justice is central to their success, as is the equally powerful sense of governmental injustice.

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[643] Interview with Ahmed Tassal, Helmandi journalist. Tassal had himself interviewed several Taliban judges

[644] This account is taken from my report of the case made at the time, in August 2007. It has been reported elsewhere, in Ledwidge, 'Justice in Helmand'. For other similar cases, see the body of the report and appendices in Giustozzi, Baczko and Franco, 'Shadow justice'

[645] This account is taken from my report of the case to the UK Provincial Reconstruction Team made in August 2007. It has been reported elsewhere, in Ledwidge, 'Justice in Helmand'

The Taliban's judicial strategy today

The Taliban's narrative of justice is prioritised as 'practically the only quasi-state service that they provide'.[646] It has been estimated that the Taliban justice system nationally comprises in the region of 500 judges, ranging in qualification from fully qualified religious scholars (called *maulawis*) to men with a local reputation for fairness.[647] They are reputed to be paid in the region of $250 per month, which is a good salary in Afghanistan.

The procedure involved in Taliban courts is full and comprehensive, but straightforward. Some of the following is drawn from a fine report, itself based on extensive interviewing by a team led by Antonio Giustozzi.[648] The procedure is reported to be nationally consistent – from first instance courts (probably not unlike the 'motorcycle courts' mentioned above) to a Taliban 'Central Court' (Supreme Court) which in theory has its location in Helmand, but probably in fact sits in Pakistan.[649] At first instance, a judgment can be delivered immediately, or it may take up to a month if further witnesses need to be called. As will be seen below, this compares very favourably with the state court provision. The procedure itself requires no lawyers or specialist knowledge. It usually takes the form of a traditional Sharia court hearing, of the kind that has taken place in Afghanistan and throughout the Islamic world for centuries. This involves the parties being heard and the judges going on to hear whichever witnesses they deem relevant. Judges will make their own enquiries. Critically, Taliban justice is not likely to involve anything like the same degree of payment of large bribes which is a major problem for the state courts.[650] Witnesses subpoenaed by the Taliban tend to turn up at court, out of fear, and torture may play a part in judicial interrogation.[651]

Punishments are seen as strict and based on traditional Sharia law, although there is doubt about the extent to which the condign *huddud* (amputation, stoning to death, etc.)

[646] Clark and Carter, 'No shortcut to stability', p21
[647] Giustozzi, Baczko and Franco, 'Shadow justice'
[648] ibid.
[649] ibid., p 22
[650] There have been allegations of corruption by Taliban courts. However the Taliban are acutely conscious of this and take steps to redress the problem (see ibid., pp27 ff). See also Giustozzi, Antonio, 'The Taliban's "military courts"', *Small Wars and Insurgencies*, 25:2 (2014), pp284–296
[651] Giustozzi, Baczko and Franco, 'Shadow justice', p21

punishments are in fact used. Enforcement is highly regarded: a judgment in a Taliban court, for example, following a land dispute, is regarded as in essence title to the land. Clearly records are kept of judgments.[652] The Taliban have what is called in Sharia law *tanfiz* – the ability to enforce. As one state judge put it to Clark and Carter:

> They have the power to do. We don't have the power to do; we only have the power just to say. If I was a Taliban judge in Paktia [a province in Eastern Afghanistan well known for its Taliban presence] I would be commander and judge and executioner and I'd be a very good judge.[653]

As was observed in Chapter 1, legitimacy can be assessed as being at least in part a function of the adjudicative procedures being seen to be fair. This is partly based on the fact that the Taliban tap into societally acceptable norms of justice provision. They claim to base their judgments on the Sharia and their procedures are not seen as a departure from traditional Afghan judicial practice.

In a remarkable documentary film made by Afghan-Danish journalist Nagieb Khaja in early 2014 and broadcast on 4 April 2014,[654] Khaja embeds with a Taliban unit in Charkh district, an area of Logar province just an hour's drive from Kabul. In the second of the two-part series, Khaja films the procedure of one Taliban tribunal, this one in Logar province. Two cases are seen to be litigated: the first concerns a widow being ejected from her home by her stepsons following the death of her husband; the second involves the settling of a debt. In both cases, it is clear that none of the parties had considered trying to settle the case using the state. The procedure (or at least that part of it which was broadcast) was very similar to the informal Sharia hearings with which Muslims all over the world are familiar, and which are still common in Afghanistan, even under the state system. The difference between the government's system in the province visited, and the Taliban's was twofold: first, as various local commentators said on film and as has already been observed, the Taliban system, while by no means incorrupt, is seen as far more trustworthy than the

[652] Ledwidge, 'Justice and counter-insurgency in Afghanistan'
[653] Clark and Carter, 'No shortcut to stability', p22
[654] See Al-Jazeera America, 'On the frontlines with the Taliban', *Fault Lines*, Al-Jazeera America, 4 April 2014 (presented and produced by Nagieb Khaja), available at http://america.aljazeera.com/watch/shows/fault-lines.html

government's system; secondly, it is amply clear that any summons or judgment will be obeyed, because it can be enforced.

It must be said that the kind of procedure seen in Logar (and indeed discussed in most of the literature) is distinct from the tribally based Pashtunwali, a system which the Taliban are said to permit alongside their own Sharia system.[655]

Their legitimacy may in turn be impacted by appropriate transparency and oversight of the relevant systems. The Taliban are acutely aware of the competitive edge they have and the degree to which it depends on perception. Accordingly, great emphasis is placed in the system on oversight. Internal oversight of the Taliban justice system is based initially on the appeals system, although doubts have been raised as to its robustness, as people are said to be afraid to attempt to impugn local Taliban judges: 'Only those who were well connected with the local Taliban leadership were likely to feel that lodging a complaint against a verdict was a real option.'[656] Corruption is said to be a 'constant challenge'.[657] Supervision of judges who are not usually local to the areas over which they adjudicate, is also exercised by the Provincial Military Commissions, which act to forestall problems connected with excessive familiarity with a given area, which can result in the temptation to take bribes from persons known to the judges concerned. Accordingly judges are regularly rotated around districts, or indeed provinces. A comprehensive system of internal rules, known as the *Layeha*, govern (or are purported to govern) Taliban behaviour.[658]

Ever conscious of the reputational risks of corruption, Taliban counter-intelligence is said to be tasked with collecting information on allegations about corrupt judges. The assessment of Giustozzi et al. is that '[r]obust internal oversight appears to have always featured in the Taliban's judicial system since its beginnings; in a sense this is also the case of external oversight, whose effective weight seems to have been strengthening recently'.[659] That external oversight takes the form of measures that range from the monitoring of rumours to the appointment of ombudsmen to deal with complaints against Taliban officials.

[655] Giustozzi, Baczko and Franco, 'Shadow justice', p37
[656] ibid., p27
[657] ibid., p28
[658] See also Mahendrarajah, 'Conceptual failure', pp107–109; Giustozzi, 'Taliban's "military courts"', pp284–296
[659] Giustozzi, Baczko and Franco, 'Shadow justice', p32

While maintaining a relatively close eye on their own image – just as the Irish Nationalists did – the Taliban discourage people from using the state courts. One state court judge in Wardak province, a contested area of the country, complained: 'I am constantly being threatened when I'm in my office, when I'm in my home or on the road. In areas where the Taliban have control, the people are basically barred from coming to the courts in the capital.'[660] It is clear that this is not an isolated instance, for several such cases have been reported in the south of the country, resulting in constant difficulty in recruiting qualified, willing staff.[661] Government prosecutors in Helmand are said to work with the express consent of the Taliban. For example, Jonathan Steele, in his *Ghosts of Afghanistan* reports that the district prosecutor of Marjah (it is here that General McChrystal claimed to have installed a 'government in a box') 'is believed to have obtained clearance from the Taliban before taking up his appointment'.[662]

There are limitations to the Taliban's juridical success. They have achieved limited penetration in the cities,[663] and they are generally regarded by many as being too keen to rely on violence, or indeed the stricter end of the spectrum of Islamic justice. Their reach is also limited to the Pashtun areas of the country – that area, in other words, where the insurgency is – not coincidentally – strongest. However, the judgement of Antonio Giustozzi, who has studied the Taliban for over a decade, carries a great deal of weight: 'Whatever individuals might think of the features of the Taliban's judiciary, the Taliban's success in bringing their judiciary to remote rural communities in thousands of Afghanistan's villages is undisputed.'[664]

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[660] International Crisis Group, 'Reforming Afghanistan's broken judiciary', Report No 195 (Brussels, 2010), p24, available at http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/195-reforming-afghanistans-broken-judiciary.aspx

[661] 'Gunmen kill Afghan government prosecutor', *The Hindu*, 21 August 2011, available at http://www.thehindu.com/news/international/article2379032.ece See also Patel, Naina, 'The long road to justice', *Guardian*, 15 September 2011, available at http://www.theguardian.com/world/2011/sep/15/long-road-justice-afghanistan

[662] Steele, Jonathan, *Ghosts of Afghanistan: The haunted battleground* (Portobello, 2012), p28

[663] Although the author's interviews would suggest they have had success at the very least in the Southern cities of Lashkar Gah and Kandahar

[664] Giustozzi, Baczko and Franco, 'Shadow justice', p40. See many media reports, for example BBC, 'Why many Afghans opt for Taliban justice', BBC Online, 2 December 2013, available at http://www.bbc.co.uk/news/world-asia-24628136

The next chapter will look at the problems faced by the Afghan incumbent government and, more specifically, their allies from the West in attempting to bolster that formal system. While the Taliban's justice efforts are well known – indeed it might be argued that they are a mature and developed form of judicial organisation, at least by Afghan standards – another insurgency supposedly inspired by Islamic notions of justice is making real efforts to entrench its authority by using civil administration, and particularly courts.

Contemporary Syria

A *New York Times* article in May 2013 reported on a conflict between courts in Aleppo:

> The court system serves as a prime example of the contest for a postwar Syria. As crime has proliferated after government control vanished in many areas. Syrians clamored for security. Rebel leaders, particularly Islamists, responded by opening dozens of courts.[665]

In this, of course, the rebels were, according to the *New York Times*, responding to a need for security following local conflict, itself against the background of an intense continuing civil war. It is instructive that once an element of control had been established, the first impulse, at least in this case, as reported, was to set up dispute resolution mechanisms – courts.

The first such courts in Aleppo were run by a group of former judges and lawyers calling itself the 'United Courts Council', according to a CNN report from January 2013,[666] or the 'United Court of the Judiciary Council' (*al-mahkama al-muwâhada lil-majlis al-qadhâ'i*). The report gave the impression of a relatively 'normal' operation, complete with a notary service. The chief prosecutor, a former professional, described the court as an 'emergency measure'. In the cells, presumably among others that the camera team were not allowed to see, were members of the Free Syrian Army, supposedly incarcerated for war crimes. One

[665] MacFarquhar, Neil, 'A Battle for Syria, one court at a time', *New York Times*, 13 March 2013, available at http://www.nytimes.com/2013/03/14/world/middleeast/a-battle-for-syria-one-court-at-a-time.html?pagewanted=all&_r=0

[666] CNN, 'Rebel court fills void amid Syrian Civil War', 26 January 2013, available at http://edition.cnn.com/2013/01/25/world/meast/syria-rebel-court/index.html

inmate blithely says he tortured a regime officer to death. One judge says of his work 'we believe that this will prepare us for the day the regime falls, for then there will be anarchy'.[667] The impression given by this report is very much of a simple renaming of jurisdiction, with much the same procedure and personnel, of the kind seen in, for example, Libya or Iraq, rather than of a revolutionary court. Indeed the legal code used is the Unified Arab Code (*al-qânûn al-'arabî al-muwahhad*), developed in Cairo in 1996 by a group of Arab jurists.[668]

Very much the same dynamic was observed by me in Benghazi and Tripoli during the Libyan revolution of 2011–12. In both Benghazi (in the early days of the revolution) and (later) Tripoli, the state courts worked very much as they had during Qadhafi's time. The same procedures were adopted and the same laws were used – based on post-colonial Italian and French models. Judges assured me that minimal disruption was taking place to normal judicial activities, and the only major controversies concerning reform revolved around details, albeit important to lawyers, of the Criminal Procedure Code.

At the time of writing, there is insufficient information coming out of Syria to determine whether anything remains of the United Courts Council in Aleppo. Nonetheless we know enough to be able at least to identify relevant hypotheses. Was this the 'shadow state' at work, testing the 'theory of competitive control'? Or is this the reflection of a normal human impulse to provide a sensible and accepted form of dispute resolution, doing exactly what the prosecutor said above – providing an antidote to anarchy. Do we see in this court the formation of a social contract in action? Or is the case simpler than that, merely the continuance of a necessary social good. Was there anything, truly, insurgent about this court at all?

The question as to whether the 'new' courts in 'moderate' rebel Syria were 'insurgent' does not arise in the case of those run by Al Nusra, a militia closely linked to Al Qaeda. In the

[667] ibid.
[668] Baczko, Adam, Doronsoro, Giles and Quesney, Charles, 'The civilian administration of the insurgency in Aleppo, Syria', Global Observatory, 19 November 2013, available at http://www.theglobalobservatory.org/analysis/624-the-civilian-administration-of-the-insurgency-in-aleppo.html

latter part of 2013, in Aleppo, a French TV station filmed an extraordinary 15-minute piece on four courts which had been set up by the Jabhat al Nusra rebel armed group supported by an 'Islamic Police Force',[669] which tried those suspected of involvement with regime forces. It is not clear whether this system eventually replaced or complemented the 'United Courts Council', perhaps in another part of Aleppo, but it was clearly a different kind of court. Named the 'Legal Committee' (*haî'at ash-sharî'a*), it had clearly been operating at least since April of that year,[670] complementing, but not necessarily competing with, the jurisdiction of the United Courts Council. The journalist reporting on the French documentary states that these courts, established in February 2013, are 'at the centre of the new Islamist power'.

The chief judge, who went by the *nom de guerre* Abu Suleiman, was 'on a mission to install the foundation of an Islamist society in the city'.[671] As interesting as the interviews are with the key players, it is the backdrop and some of the vignettes that are most striking. The court has the appearance of any such institution in the Arab world, with a stream of investigations being carried out by 'prosecutors' in busy offices, with witnesses waiting outside and men with rifles slung wandering the corridors. However, the differences are more striking. Adultery is one of the charges regularly litigated. No lawyers are allowed, as strict Sharia posits no such formal role. A looter is interrogated while being beaten on the soles of his feet with a cane; a man is questioned, threatened and beaten on camera for allegedly allowing his son to join Assad's army; a captured Assad soldier is freed in exchange for some valuable tactical intelligence and a fine of 500 dollars; another is transferred to the Supreme Court for judgment and possible execution.

In its Jabhat al Nusra iteration, the court was providing a basis for Islamic society – or, as otherwise framed, forming an ideological basis for a new polity. There are cosmetic similarities to the courts that preceded it, although the founding norms are entirely different. Whereas the United Courts Council uses secular law, with a leavening of Sharia (as

[669] Channel 7 France, 'Syrian rebels establish brutal Sharia Courts in captured areas', Clarion Project, 8 September 2013, available at http://www.clarionproject.org/videos/syrian-rebels-establish-brutal-sharia-courts-captured-areas

[670] Agence France Presse, 'Syrian Rebels set up courts in Aleppo', *Huffington Post*, 12 April 2013, available at http://www.huffingtonpost.com/2013/04/12/syrian-rebels-courts-aleppo_n_3066264.html

[671] Channel 7 France, 'Syrian rebels establish brutal Sharia Courts in captured areas'

is common in Arab societies), the Al Nusra court is avowedly a Sharia court, with none of the accoutrements of civil law. There are no lawyers, and the judges seem to act not in accordance with any form of due process, but according to their own views of what Sharia is. Nonetheless, with a clear structure formed of district and appeal courts, this is a system that aspires to legitimacy and longevity.

As of late 2013, these two jurisdictions seemed to be co-existing, albeit very uneasily. In late 2013 it was reported that:

> The Legal Committee is accusing the members of the civilian administration of being bad Muslims – a strong argument in a time of jihad – while the institutions attached to the Coalition [United Courts Council] consider their rivals incompetent. Last August, men from the Legal Committee even encircled the United Court for one day until they were forced to retreat by the Free Syrian Army combatants closely related to the civil institutions.[672]

However, there was clearly a threat emerging from a group even more potentially radical than Al Nusra and its close allies. This group – known in English as the Islamic State of Iraq and the Levant or ISIL[673] – refuses 'to play this institutional game'.[674] With the situation in Syria fluid and intensely dynamic, there can be no doubt that matters have moved on since late 2013.

Islamic State

Despite a considerable amount of interest and discourse on the so-called Islamic State, (hereinafter 'IS') its history, military capability, ideas and governance in general[675] there is very little, if any, academic or even journalistic literature on IS courts at the time of the submission of this thesis partly due to the security risks in gaining any primary evidence.

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[672] Baczko, Doronsoro and Quesney, 'Civilian administration of the insurgency in Aleppo, Syria'

[673] ibid. 'This group, affiliated with al-Qaeda, was formed in April 2013 from the fusion of the Islamic State of Iraq (*ad-dawla al-islâmîyya fî-l-'irâq*), the Iraqi branch of the movement, and a section of Jabhat al-Nusra, notably the foreign fighters engaged in Syria'

[674] ibid.

[675] See for example Lister, Charles, *Profiling the Islamic State, (Brookings Doha Center Analysis Paper December 2014)* available at http://www.brookings.edu/~/media/Research/Files/Reports/2014/11/profiling%20islamic%20state%20lister/en_web_lister.pdf ; Napoleoni, Loretta, *The Islamist Phoenix, (Seven Stories Press 2014)*

At the outset it is worth asking the question as to whether Islamic State constitutes an insurgent entity at all. Whilst formally, if the current borders of Syria and Iraq are accepted as valid, there is no question that it is. On its own terms, in fairness like many insurgent entities, it is something entirely different. Commentators are at one in stressing that the Islamic State attaches a great deal of importance to its ability to establish and enforce its authority and provide social goods. This is not the commonly seen aspect of IS rule, at least in western media. Loretta Napoleoni in her late -2014 book on IS '*The Rising Islamist Phoenix*' quotes an IS member who deals explicitly with the question of perspectives

> 'You look only at the executions, but every war has its executions, its traitors, its spies. We set up soup kitchens, we rebuilt schools hospitals, we restored water and electricity, we paid for food and fuel. While the UN wasn't even able to deliver humanitarian aid we were vaccinating children against polio. Its just that some actions are more visible than others'[676]

As Charles Lister says in his study for the Brookings Institute 'Its explicit objective is to establish and maintain a self-sufficient Islamic state and, as such, IS has attached its ability to rule and govern as a determinant of success. Within a broader context of instability and conflict, IS's combination of tough law and repression with the provision of key services and assistance has at times led to a measure of tacit acceptance on a local level'[677] It has, in the words of Loretta Napoleoni 'assimilated some of the characteristics of the modern state, such as domestic legitimacy gained by a rough social contract.[678] Lister agrees; IS 'offered much of what nation-state systems do, but with more intense oversight.'[679] All writers are very clear that there is a keen stress on the appearance of governmental propriety implied by that 'oversight'. This against a background of serious instability that has persisted for over a decade in some places. As one journalist Aaron Zelin writes in a June 2014 article in

[676] Napoleoni, *Profiling the Islamist Phoenix*, pp48-49
[677] Lister *Profiling the Islamic State* p 2
[678] Napoleoni, *The Islamist Phoenix* p 55
[679] Lister, *Profiling the Islamic State* p 26

'the Atlantic' on the 'softer' aspects of its rule, 'IS is able to offer a semblance of stability in unstable and marginalized areas, even if many locals do not like its ideological program'.[680]

A major part of that programme, by all accounts, is the IS judicial system. Little has been written on it, due largely to the security risks attached to any form of visit to IS territory. One journalist gained access to Raqqa, the capital of the self-styled Islamic State. In a remarkable article, Mariam Karouny writes that, after an initial crackdown, Islamic State began 'setting up services and institutions – stating clearly that it intended to stay and use the area as a base. "We are a state," one commander in the province said. "Things are great here because we are ruling based on God's law."'[681] Karouny writes that some Sunnis who had worked for Asad (the president of the incumbent government of Syria) are said to have stayed on after they pledged allegiance to the Islamic State. 'The civilians who do not have any political affiliations have adjusted to the presence of [Islamic State], because people got tired and exhausted, and also, to be honest, because they are doing institutional work in Raqqa', said a Raqqa resident opposed to Islamic State.[682] This would appear to buttress, in Napoleoni's phrase, that 'rough social contract'.

Lister affirms that 'the implementation of a strict form of sharia law is *clearly central* [my italics] to IS's governance'.[683] Details of the running of these courts are far sparser than for the Afghan Taliban, for the security reasons outlined above. However, as with the Jabhat al Nusra and Taliban courts, some primary evidence is available in the form of television footage. This in itself may indicate an important factor in the priorities of Islamic State. They have shown themselves to be highly aware in their social media presence, of the potential of, from their perspective, positive coverage. Nowhere is this more apparent than in a documentary programme produced by Vice News on the emerging and intensely

[680] Zelin, Aaron, The Islamic State of Iraq and Syria has a consumer Protection Office' the Atlantic (June 13 2014) available at http://www.theatlantic.com/international/archive/2014/06/the-isis-guide-to-building-an-islamic-state/372769/

[681] Karouny, Mariam, 'In Raqqa, ISIS governs with fear and efficiency', *The National* (Pakistan), 5 September 2014, available at http://www.thenational.ae/world/middle-east/in-raqqa-isil-governs-with-fear-and-efficiency#ixzz3CS8248zo

[682] ibid.

[683] Lister *Profiling the Islamic State*, p 26

controversial state. The documentary, called *Inside the Islamic State* in part follows the work of the 'Hisbeh', the Islamic police in Raqqa, in mid 2014.[684]

The Hisbeh call their approach 'positive intervention', and one of their number states: 'We aim to build an Islamic state in all aspects of people's lives.'[685] A key element of that control is the work of the courts – or the part of it that the Islamic State 'media officer' who accompanies the Vice News crew allows them to see. The courts are based in the old court building of Raqqa, and cases are brought and registered in much the same way as in any Arab state court. Indeed the building and routines as seen in the documentary are very similar to those seen in the Al Nusra courts. This, of course, is not surprising, given that both groups were using Syrian state court buildings. While the documentary shows the results of a murder trial in the form of a crucifixion, it also makes clear that most of the court's work concerned arbitrating minor disputes. The court clerk to Judge Abu Al Bara'a, named 'Haidara', is interviewed: 'The court has returned rights to the people after the oppression they suffered under the regime's courts.'[686] It is explained that there are specialist judges for 'all kinds of cases'.

A particularly jarring, but significant, moment comes when 'Haidara' is asked: 'Does this court meet international standards?' To which 'Haidara' answers: 'Of course not; we aim to satisfy God, we don't care about international standards.' The court, as portrayed in the documentary, was full and, as in Aleppo, busy and visually very similar to courts in any other part of the Arab – or indeed civil law (as distinct from common law) – world.

Both these areas and the accounts above are gleaned from the media. All sets of journalists were escorted by press officers, the Islamic State media officer becoming something of a star of the documentary. The appearance of order, administration, accountability and legitimacy is more important than the reality, which is at best relevant only to the population of the city. The fact that these programmes were made at all is testament to the importance of this impression being made on target populations. Patrick Cockburn, a veteran journalist on the Middle East and author of *The Jihadis Return* sums up his

[684] Vice News, 'Inside the Islamic State', August 2014, available at https://news.vice.com/video/the-islamic-state-full-length
[685] ibid., minute 27
[686] ibid., minute 28:50

impression of the way Islamic State uses the media: 'Followers of ISIS [*sic*] continually flood Twitter with pictures of the bodies of their enemies, but they also use the medium to show functioning hospitals and a consultative administrative process.'[687]

At the time of writing, it seems unlikely that Islamic State will itself be accepted as a legitimate state, and even less likely that the judgments of its courts will be regarded as having legal integrity. The legality of insurgent courts is potentially an important issue, and we turn to it now.

Section 3

The legality of insurgent courts in international law

The message of insurgents comes across more easily in the international forum of lawfare if their own systems of justice are in accordance with international standards, and indeed international law. Though, as we have just seen, the spokesman for the Islamic State's court in their capital Raqqa is not in the least interested in whether his courts behave in accordance with international standards.

That notwithstanding, there are provisions in international law relating to insurgent courts, although they are minimal and to an extent ambiguous. Accordingly, there is controversy over with what norms insurgent courts need to comply under international law in order that they might be properly regulated – or indeed whether it is right in terms of international stability that they should be accorded any implied legitimacy by setting standards at all. Clearly international legitimacy accorded by compliance with such standards can work in favour of insurgents. There is, however, another view, which may be characterised as the 'conservative view', which believes that to accord insurgent courts legitimacy might result in the undermining of international security.

Governments do not recognise their insurgents as combatants with legitimate objectives worthy of recognition. As one of the leading authorities on the law of non-international armed conflict, Sandesh Sivakumaran, says: 'There were very few conflicts in which the

[687] Cockburn, Patrick, *The Jihadis Return: ISIS and the new Sunni uprising* (OR Books, 2014), p119

[insurgent] armed group was recognised as belligerent, thus bringing into play the law of international armed conflict.'[688]

Clearly, as we saw in Chapter 1, to treat insurgents as belligerents essentially concedes to them a possibly critical degree of legitimacy. Instead, they are almost invariably treated as criminals worthy of prosecution and punishment under municipal criminal law. The essence of this approach is to ensure precisely that concentration of legal legitimacy in one authority – the so-called monopoly of force. To do otherwise would be to acknowledge that insurgents may have a practical claim to compete in legitimacy with the incumbent state as 'belligerents'. Even if a state were to concede the question of 'belligerency', to do so would be to accord insurgents a status which, from the legal practical perspective, would take them out of the legal control of the counterinsurgent power.

The case for regulation of insurgent courts is founded on two key legal documents. The first is the so-called 'Common Article 3' of the Geneva Conventions of 1949.[689] It is called 'Common Article 3' because it appears in all four Geneva Conventions as Article 3. The usual shorthand for it is CA3. CA3 is primarily, or indeed exclusively, concerned with the protection of 'persons taking no active part in hostilities' in 'conflicts not of an international character'. As well as civilians, such persons are said to include 'members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or other cause'.[690] There is an overall obligation for such persons to be treated humanely.[691] As such, it prohibits 'violence to life and person',[692] the taking of hostages,[693] and humiliating and degrading treatment.[694]

Crucially for present purposes is article 3.1(d), which states that 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples' shall be prohibited.

[688] Sivakumaran, *The Law of Non-International Armed Conflict*, p490; also pp17–20
[689] The Geneva Conventions of August 12 1949 (International Committee of the Red Cross 2009 edition)
[690] Common Article 3.1
[691] ibid.
[692] Common Article 3.1(a)
[693] Common Article 3.1(b)
[694] Common Article 3.1(c)

The key words here are 'regularly constituted court'. What constitutes such a court and the implications of such tribunals has given rise to much debate.[695] CA3 must be read in conjunction with another key provision in international humanitarian law. During the 1950s and 1960s, as has been seen, there was a great deal of 'non-international armed conflict', insurgencies, revolutions and the like. It was determined that the law concerning this kind of conflict was inadequate – specifically the rules relating to the victims of conflict.[696] Over a period of about a decade, the Second Protocol Additional to the Geneva Conventions was drafted. It was promulgated in 1979, along with the First Additional Protocol, which largely concerned the protection of victims of international armed conflict.[697]

The Second Protocol concerned the protection of victims of non-international armed conflict. For present purposes, the key provision is contained in article 6, which 'applies to the prosecution and punishment of criminal offences related to the armed conflict'. It states that 'No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality.' It sets out what minimum guarantees are required.[698]

There is no mention of 'insurgent' or 'government'. The objective of the article is clear. Indeed the objective of both articles taken together is clear. This is to avoid the possibility of some form of legal vacuum developing and the consequent high possibility of summary justice being applied in the form of executions, without any protection in the shape of some kind of legal procedure for the accused. The International Committee of the Red Cross Commentary on CA3 states this with its customary clarity:

> Sentences and executions without previous trial are too open to error. 'Summary justice' may be effective on account of the fear it arouses, though that has yet to be proved; but it adds too many further innocent victims to all the other innocent victims of the conflict. All civilised nations surround the administration of justice

[695] See, for example, Sivakumaran, 'Courts of armed opposition groups'; Somer, 'Jungle justice'; Gejji, 'Can insurgent courts be legitimate'
[696] Sivakumaran, *Law of Non-International Armed Conflict,* pp49–54 for the diplomatic manoeuvrings concerning the development of the Additional Protocols
[697] Protocols Additional to the Geneva Conventions of 12 August 1949 (ICRC Geneva)
[698] See Additional Protocol II article 6.2 a–f

> with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that is essential to do this even in time of war.[699]

There is no further elaboration as to what a 'court' is, or under whose auspices such a court must be run. As Sivakumaran puts it: 'this addresses the scope of the provision but not the actors to whom it is addressed'.[700]

Two clear views have emerged in the discourse on this matter. Much of it has revolved around what a 'regularly constituted court' is in CA3. The arguments are long and complicated, and often turn on what intentions can be construed from the *travaux préparatoires* of Additional Protocol II (APII) in particular. The first view might be characterised as the 'conservative approach', and might be summarised as stating that to accept that an insurgent court can be 'regularly constituted' is to undermine international humanitarian law and could open the gates to great risks by conferring legitimacy on procedures that can never comply with international standards. As Gejji says: 'At the end of the day, the real question is less a question of law than of policy: how much is the international community willing to risk in order to legitimize (and thus, hopefully engage) insurgent courts?'[701]

The other view may equally be summarised as taking the pragmatic view that such courts cannot be ignored: they will be constituted and, although they may provide an absolute minimum of protection, such protection is better than none at all. From the legal perspective, they say, had the drafters wished to exclude insurgent courts, they could and would have done so.

It is in places such as Afghanistan that, as Sivakumaran says: 'The concern of affording courts of armed groups a certain legitimacy and armed groups themselves some semblance of status also forms part of the explanation as to why the international community fails to engage with these courts.'[702] By way of illustration, there was no question whatsoever of

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[699] International Committee of the Red Cross, Commentary IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (ICRC, 1958), p39

[700] Sivakumaran, 'Courts of armed opposition groups', p496
[701] Gejji , 'Can insurgent courts be legitimate', p1554
[702] Sivakumaran, *The Law of Non-International Armed Conflict*, p558

the Sri Lankan government accepting a Tamil Tiger judgment on land while the conflict in Sri Lanka was active, whether or not such a judgment had been enforced and accepted by all concerned.

For the future there is the question of the degree to which the international community will (or indeed may) even in theory engage with insurgent courts. Clearly, for many countries this is more of a political than a legal question. There is, of course, also a 'de facto' element here which argues strongly in favour of greater engagement. As Sivakumaran says: 'Rather than ignoring them [courts] or criticizing them without offering concrete suggestions for improvement, the international community needs to grapple with them and consider how best they may be utilized in order to aid enforcement of the law.'[703] Caveat the arguments of those who have been termed here 'conservatives', the arguments surely argue strongly in favour of international law according some form of recognition to insurgent courts.

These legal arguments concerning the extent to which insurgent courts are mandated under international humanitarian law have both historical and contemporary resonance. But they also tap closely into the question of legitimacy. The effect of the 'cloak of legitimacy' overseas conferred on such groups as the Irish Republicans or the Tamil Tigers by virtue of their effective system of courts has already been remarked upon. That legitimacy would only be extended were the 'international community' to accept such courts as having some legal validity.

One of the arguments of what has been described here as the 'conservative' tendency regarding the legality of insurgent courts has been precisely that lending such courts some legal foundation will tend to reinforce their wider legitimacy. This is undoubtedly the case. It will give them something of a 'cloak of legitimacy',[704] which may operate more effectively in the international domain than in the national political struggle, where arguments concerning the details of international humanitarian law may have less purchase than in other more academic fora. To some extent, the acceptance of insurgent courts as legitimate

[703] ibid., p562
[704] Sivakumaran, 'Courts of armed opposition groups', p508

– and the consequent bolstering of the legitimacy of the cause internationally – may depend rather more on how a media strategy is conducted than on legal debates.

This external 'cloak of legitimacy' will tend to augment the internal legitimacy accorded to a group by the very fact that it is, as the UK Manual says, maintaining a degree of law and order where none might previously have been evident. This may well be present, as it is with the Taliban, for example, with or without academic legal support. External legitimacy is important – even vital. However, it may be argued, it is not dependent on the vagaries of international humanitarian law.

Regularly constituted?

The procedures for tribunals are minimally qualified by CA3 as needing to be 'regularly constituted' and to afford all judicial guarantees which are recognised as 'indispensable' by civilised peoples.[705] The term 'regularly constituted' does not appear in APII. In APII, judicial guarantees are not seen as 'indispensable', but are rather 'essential guarantees of independence and impartiality'.[706] Gejji suggests that APII has thereby loosened the definition. Another view might be that between 1949 and 1979, a great deal of work was done on fair trial guarantees in the international legal world, notably the International Covenant on Civil and Political Rights (ICCPR) whose article 14 is reflected in the provisions of APII.[707] Rather than 'loosened', it might be argued that the requirements are in fact extended. In no sense can APII be seen as 'repealing' the provisions of CA3; rather they modify and extend them. Can insurgent courts, then, be 'regularly constituted'? Since there is no qualification as to such courts being 'national' in nature, it seems that the answer depends on whether or not they accord due process to those under their purported jurisdiction.

Then there is the question of whose 'law' these 'regularly constituted courts' are to operate under. The question is further complicated by the construction of the term 'law' in APII, a word which appears several times. So whose law? The United Kingdom view may well be

[705] In CA3 (1)(d)
[706] Gejji , 'Can insurgent courts be legitimate', p1524
[707] International Covenant on Civil and Political Rights, article 14, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

contained in the UK 'Joint Service Manual of the Law of Armed Conflict', which states that 'the use of the bare word "law" must be taken to include both national and international law. It could also be wide enough to cover "laws" passed by an insurgent authority.'[708] This seems a sensible and measured view – especially since in neither provision (CA3 or APII) is 'national law' specified. The Manual pragmatically summarises the legal controversy:

> The right of the established authorities to prosecute, try, and convict persons charged with such offences is left intact but the necessity for some form of minimal judicial guarantee is evident in that situations involving non-international armed conflict also often bring with them the suspension of constitutional guarantees, the promulgation of special laws, and the creation of special jurisdictions.[709]

In other words, something is better than nothing. That pragmatic argument is reinforced by Sivakumaran:

> ... in so establishing, these courts do act as a counterweight to the disorder and chaos that would otherwise rein [*sic*] in the territory under armed group control. Even in territory under governmental control, the existence of an armed conflict can lead to general lawlessness with criminal gangs flourishing in a climate of impunity. Significant benefits accrue to the civilian population if law and order is maintained.[710]

That said, another article of the Conventions, article 64 of the Fourth Convention (relating to the protection of civilian persons in time of war), makes an important point not generally raised in this context.[711] Where an occupying force is present, 'the penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or

[708] UK Ministry of Defence, 'Joint Service Manual of the Law of Armed Conflict' (JSP 383), p404 fn94, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf
[709] ibid., p405
[710] Sivakumaran, 'Courts of armed opposition groups', p509
[711] Although see ibid., p510

an obstacle to the application of the present convention'. These provisions of the 1949 Geneva Conventions only apply in situations of international armed conflict. However, mutatis mutandis a strong argument could be made that insurgents are bound by that provision until they themselves attain statehood.

The same article of the Geneva Conventions implicitly recognises the need to avoid a legal vacuum – a pragmatic recognition directly relevant to the status of insurgent courts. Aside from the arguments as to what constitutes 'law' or 'regularly constituted courts' deriving from the two articles discussed above, there are other obligations inherent in the Geneva Conventions. Article 64 goes on to state that in occupied territories there is a duty upon an occupying power 'to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration'. Read broadly, this provision would seem to go further than legitimising insurgent control in the form of courts and administration; indeed it might be interpreted as mandating it, in the admittedly unlikely event that insurgents were to be considered an 'occupying power' for the purposes of the convention.

The implications of developing a 'regularly constituted' court go beyond maintaining 'law and order'. For courts, as has been seen in this chapter, have roles that extend into every aspect of day-to-day life as regulators and validators of civil administration. The film *Battle of Algiers* contains a brief scene where a marriage of two insurgent operators takes place in the presence not of a French notary, but of an FLN official. It is perhaps a reflection of the priorities of international discourse concerning courts that much of the discussion involves not the actual day-to-day duties of most courts in most places, but the prosecution of war crimes and the enforcement of criminal laws. Yet it may well be that, for those who live in 'insurgent areas', their civic role as regulators is of equal importance not only to their own lives but to the legitimacy of the insurgent campaign as a whole. Courts are, of course, at heart systems of dispute resolution. The absence of such systems itself creates instability in areas under 'rebel' control. Therefore, above and beyond the 'law and order' argument, there is a structural impetus behind the development of such courts, as well as sound reasons to accord them some degree of international recognition.

By way of summary, as a leading expert on International Law told me 'International Humanitarian Law does not really address whether insurgent courts are legal; rather they set out to regulate how they might be used.'[712] In so doing, it is argued here, compliance with international law or the spirit thereof could ensure a degree of legitimacy which might otherwise be absent. It could act to strengthen an insurgent narrative of fairness and propriety within a wider informational context.

Chapter conclusion

In the words of Douglas Porch, 'each insurgency is a contingent event in which doctrine, operations and tactics must support a viable policy and strategy and not the other way around'.[713] As Michael Martin points out, what might have worked for Thompson in Malaya may not work for McChrystal in Afghanistan.[714] This is as true for insurgents as it is for counterinsurgents: what may have worked for T.E. Lawrence (for he was an insurgent) will not have worked for Gerry Adams in Belfast. There are no failsafe formulae for success. However, it is clear that the creation of a shadow state – with its attendant administrative machineries – is essential for the success of insurgencies in most situations. As outlined in Chapter 1, it is equally clear that a key part of any administration is the 'judiciary'. As Anne Marie Baylouny has written, 'authority is tied to the provision of substantive services to the population'.[715] However, courts have the potential to be far more than another social good provided by the insurgent government. While systems of taxation are often of a compulsory nature, the decision as to whether to take one's dispute to a particular court depends on an assessment on whether that dispute will be fairly settled, and indeed on an assessment as to whether the judgment of the court can be executed or enforced. The provision of an

[712] Discussion with the author November 2014
[713] Porch, *Counterinsurgency*, pxii
[714] Martin, 'War on its head', p26
[715] Baylouny, Anne Marie, 'Authority outside the state: non-state actors and new institutions in the Middle East', in Anne Clunan and Harold Trinkunas, *Ungoverned Spaces* (Stanford University Press, 2010)

educational system, while it may be highly laudable (and indeed, in the long term, politically effective in terms of indoctrination), is not usually a competitive endeavour. Courts in such places as have been discussed in this chapter are, by their nature, usually acting in direct competition with state provision. This is at least equally evident with respect to the Taliban, whose system was examined above.

The absence of such a system when disputes arise – particularly when disputes involve issues of such fundamental importance in agricultural societies as land – can itself be a driver of insurgency. This was surely the case in Kenya and Ireland in the periods looked at in this chapter. Whereas in Kenya the reaction was largely violent, with little or no attempt to set up a shadow administration, in Ireland it might well be argued that the key element of the struggle was in fact the judicial and administrative element. What may have been missing in the Kenyan case and present in the Irish one is again beyond the scope of this thesis.

Whereas in the Irish War of Independence the courts were highly contingent on a long and complex history of a battle for legal authority between arbitration courts and the state system, in Syria today such courts as appear to have arisen have done so as a reaction to the lack of 'law and order' in insurgent areas *as well as* a bolster to their own sense of legitimacy. In almost all cases discussed in this chapter, however, there has been something of a transference of style – and indeed often legal substance – from the previous regime to the new/insurgent regime.

In Chapter 1, the idea of lawfare was linked explicitly to Clausewitz's often quoted ideas of war as multidimensional. Nowhere is this more evident than in the world of insurgent lawfare. It is not argued here that using courts as weapons is an option open to all, or even most, insurgents. It is, however, a weapon whose potential has rarely been appreciated. For courts are more than just another social good to be provided. As was argued in the introduction to this thesis, they are theatres of narrative, as well as expressions of power and legitimacy.

In one sense, the case of insurgent courts lies at the heart of this thesis, as they crystallise the issues raised in the research questions. The impact of lawfare in this form can be very great. This is clear from, at the very least, the Irish and recent Afghan cases. Similarly,

coupled with the successful use of 'rupture' (described in the last chapter), with the exploitation of free media and with the establishment of a strong narrative in the legal arena, this can be highly effective in undermining legitimacy on the ground in contested areas. In turn, this has demonstrated the potential of the development of what Verges has called a 'judicial strategy'.

What Mampilly says in his study of insurgent governance has been demonstrated in this thesis:

> A variety of non-state actors, including insurgent organizations can and do control the fate of civilian communities for substantial periods. Thus, international societies must find ways to comprehend such territories or risk abandoning them.'[716]

How counterinsurgents can develop appropriate strategies for such 'ungoverned' space is the subject of the next chapter.

[716] Mampilly, *Rebel Rulers*, p46

CHAPTER 4

Lawfare and Insurgency in 'Ungoverned Space'

'He lives in a land with a settled social system, where life is secure and where the rights of property are protected by laws which are obeyed. But his opponent has grown up in very different conditions. He has been accustomed, like his fathers before him, to look upon might as right and to trust to his own right hand for safety amid the turbulent surroundings in which his lot is cast.'[717]

Introduction

In this chapter, we turn to focus on how 'exogenous' actors have dealt with two problems: first of government in general; and second of the (intimately linked issue) of the provision of what in the West is called 'justice'.

Section 1 looks at the problematic concept of 'ungoverned space'. Does it exist and what part might courts play in its government? The case of the 'Islamic Courts' movement is briefly addressed to illustrate both the centrality of dispute resolution in ungoverned space, and what can happen when organically evolved solutions are dismantled. It goes on to ask whether such places necessarily require the 'rule of law' approach advocated often in contemporary counterinsurgency and 'stabilisation' missions, or whether a more pluralistic approach can work. Does the history and experience of colonialism have any lessons for aspirant 'exogenous' rulers of differently governed space?

Section 2 drills down into one such contemporary mission: Afghanistan today. In the previous chapter, the challenge of the Taliban was outlined. What has been the response of the incumbent government and particularly its foreign allies? The case of justice reform in a counterinsurgent environment is looked at primarily through the lens of the British experience in Helmand.

Finally, Section 3 attempts to draw together some of the threads of the chapter by providing a series of 'lessons from Afghanistan' that I believe may be useful in other contexts. We then proceed to a conclusion, asking 'who is the insurgent'

[717] Callwell, Charles, *Small Wars, Their Principles and Practice* (Tales End Press Edition, 2012), Chapter XIII

Section 1 Courts, law and 'ungoverned space'

The fiction of 'ungoverned space'

Charles Callwell's characterisation of war in what is now called 'ungoverned space' is common even a century after his iconic book was published. There is a polarisation between a 'settled social system' and a society where all are against all, and reliance must be placed on one's 'own right hand'. Thomas Barfield coined the phrase 'clash of two goods' to describe the conflict between state-formal systems and customary-tribal systems.[718]

Some societies display few of the attributes of 'rational legal' government. Indeed it is argued that 'ungoverned' or 'alternatively governed' space is rather more the norm than the exception, as 'the dominance of the Westphalian state in governance provision has steadily eroded since the end of the Cold War'.[719] Societies such as this are often characterised as 'ungoverned'.

To governments dominated by the rational 'Westphalian' state legal paradigm, such areas are seen as threatening, particularly against the background of the perceived growing threat of 'terrorism', which is often considered to centre itself in such areas. As Clunan and Trinkunas have put it: 'If only from an evolutionary perspective it is normal to expect that all states will perceive ungoverned spaces as threatening, even if they contain no threats.'[720]

Many of the West's recent military engagements and its parallel civilian efforts have been predicated upon preventing the emergence of ungoverned space into which terrorists might fit. The essential narrative of this idea was summarised well by the former foreign secretary, Jack Straw, consciously referring to the Hobbesian dynamic already discussed in Chapter 1:

> [Places like] Somalia, Liberia and Congo invoke the Hobbesian image of a 'state of nature' without order, where continual fear and danger of violent death render life nasty, brutish and short … As well as bringing mass murder to the heart of

[718] Barfield, Thomas, Nojumi, Neamat and Thier, J. Alexander, 'Clash of two goods' (United States Institute for Peace), available at http://www.usip.org/files/file/clash_two_goods.pdf

[719] Clunan, Anne and Trinkunas, Harold, 'Alternative governance and security', in Anne Clunan and Harold Trinkunas (eds), *Ungoverned Spaces* (Stanford University Press, 2010), p277

[720] Clunan, Anne and Trinkunas, Harold, 'Conceptualising ungoverned spaces', in Anne Clunan and Harold Trinkunas (eds), *Ungoverned Spaces* (Stanford University Press, 2010), p27

> Manhattan, state-failure has brought terror and misery to large swathes of the African continent. And at home it has brought drugs, violence and crime to Britain's streets … We need to remind ourselves that turning a blind eye to the breakdown of order in any part of the world, however distant, invites direct threats to our national security and well-being.[721]

This kind of approach has had considerable scholarly support. For example, in 2007 the RAND Corporation produced a book on the topic, which took the following view:

> [U]ngoverned territories generate all manner of security problems, such as civil conflict and humanitarian crises, arms and drugs smuggling, piracy, and refugee flows. They threaten regional stability and security and generate demands on US military resources.[722]

Whether or not those 'demands on US military resources' are self-generated depends to some extent on whether the authorities controlling the US military accept the premise that ungoverned space necessarily equates to a threat to the international order and national security. The RAND paper discusses in detail several areas of the world perceived to be 'ungoverned spaces': those areas taken together constitute a considerable portion of the Earth's surface.[723]

Each of the extensive chapters in that paper is written on the understanding that military intervention may be required. The book itself is part of a series funded by the US Air Force. Much of the strategy of United States defence policy has been predicated on the need to

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[721] Straw , J., 'Failed and failing states', European Research Institute Speech, September 2002, www.fco.gov.uk

[722] Rabasa, Angel et al., *Ungoverned Territories* (RAND, 2007), available at http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG561.pdf, piii; see also Lamb, R.D., 'Ungoverned areas and threats from safe havens', Final Report of the Ungoverned Areas Project, Prepared for the Office of the Under Secretary of Defense for Policy, available at http://www.cissm.umd.edu/papers/files/ugash_report_final.pdf

[723] Lengthy chapters in the book cover the Pakistani-Afghan border region, the Arabian peninsula, the 'Sulawesi-Mindanao Arc', the East Africa corridor, West Africa, the North Caucasus, the Colombia–Venezuela border, the Guatemala–Chiapas border

control such spaces. An entire 'command' of the US armed forces – Africa Command – was created explicitly to deal with the supposed risks attached to sub-Saharan governance.[724]

Linking failed states causally to a story of terrorism and global instability is a further step, and many commentators have argued strongly against taking it.[725] Hehir adopts a methodologically similar approach to RAND of surveying a large selection of countries, but comes to very different conclusions. He sees

> … no causal link or pronounced correlation between failed states and the proliferation of terrorism or between democratization and the negation of terrorism.[726]

Rather he sees the kind of assertion represented above as a 'façade erected not because of its accuracy but because of its rhetorical impact'.[727]

The question of whether there is in fact any 'ungoverned territory' in the world is itself problematic. In speaking about Afghanistan, Robert Johnson could have been discussing any one of several similar environments:

> The absence of Western state structures of governance in large swathes of the tribal areas should not be conflated ... with the absence of governance. Complex and sophisticated conflict-resolution mechanisms, legal codes, and alternative forms of governance have developed in the region over millennia. Moreover, the rural Pashtuns prefer their own mechanisms to alien, external ones because, in their perceptions, theirs are clearly superior. Depictions of the frontier as a lawless land of

[724] See, for example, Wheelan, Theresa, 'African security and US interest: the problem of ungoverned space', Presentation by Theresa Wheelan, US Deputy Assistant Secretary of Defense for African Affairs on establishment of 'Africa Command' (2007), available at http://www.youtube.com/watch?v=0zd2uE5l33E

[725] For example, Call, Charles T., 'The fallacy of the "failed state"', *Third World Quarterly*, 29:8 (2008), pp1391–1407; Hehir, Aidan, 'The myth of the failed state and the war on terror: a challenge to the conventional wisdom', *Journal of Intervention and Statebuilding*, 1:3 (2007), pp307–332; Boas, Morten, 'The rhetoric of the failed state', *European Journal of Development Research*, 17:3 (2005), pp385–395

[726] Hehir, 'The myth of the failed state', p328

[727] ibid., p329

> endless feuds and bloodthirsty tribal raids owe more to Victorian romanticism than to objective reality.[728]

Of course, de facto governments de facto exist in areas frequently claimed as ungoverned spaces. There are also, of course, the 'differently governed spaces', such as Somalia, parts of Afghanistan, Pakistan and Africa. The fact of their being 'differently governed' should not necessarily imply the necessity of intervention of any kind. There are other forms of ungoverned space. So-called 'feral cities', even in some Western countries, offshore financial markets or marginally regulated reaches of the internet.[729]

The reality is that a 'variety of nonstate actors, including insurgent organizations can and do control the fate of civilian communities for substantial periods'.[730] The extent to which the solution is the application of the seventeenth-century European (Westphalian/Hobbesian) state structure outlined in Chapter 1 is not clear. This is a question which will be addressed only in passing in this chapter. It is a truly vast problem summarised by Christopher Clapham:

> The problem of failed states is most basically about whether the grafting of such states ... onto unpromising rootstock can be made to take – even with the various kinds of fertilizer provided by the international system in the form of universalist ideologies, incorporation into the global economy and the provision of diplomatic and military support.[731]

What will be addressed in more detail is how states have successfully co-opted such structures as do exist to serve their own strategic purposes, essentially by co-opting existing dispute resolution systems, which, as has been argued, by definition both indicate and promote some level of, albeit subtle, control. As Zachariah Mampilly put it in his seminal *Rebel Rulers* (2011):

> Current policy approaches for dealing with areas under rebel control too often treat them as little more than *terra nullius* – territories devoid of any political or social

[728] Johnson, T.H. and Mason, C., 'No sign until the burst of fire', *International Security,* 32: 4 (Spring 2008), p55
[729] Clunan and Trinkunas, 'Conceptualising ungoverned spaces', p27
[730] Mampilly, *Rebel Rulers*, p46
[731] Clapham, C., 'The global-local politics of state decay', in Robert Rotberg (ed.), *When States Fail: Causes and consequences* (Princeton University Press, 2003), pp78–79

> order. This assumption renders such territories virtual black holes on the global geopolitical map, places of mystery and chaos that are impenetrable by the international community.[732]

This chapter will seek to demonstrate the truth of that statement, with particular reference to the provision of what in the West is called 'dispute resolution'. Differently framed, it will seek to show the inherent weaknesses in the way 'lawfare' is conducted in 'ungoverned space' at the 'operational level', and specifically in Afghanistan; look at how it has been done in the past; and offer suggestions for further consideration as to how it might better be done in the future.

It is therefore argued here that the narrative of 'failed states' is flawed. Afghanistan was regarded as a failed state from 1994 to 2001. Yet, as will be seen, 13 years of state-building have rendered it (by one measure at least) the least governed society on Earth.[733] However, even in Afghanistan the problem was not that the country was 'ungoverned' (which it most certainly was not). For the 'international community', the problem was rather *by whom* it was governed. Afghanistan, Somalia and North Korea share the title of 'most corrupt country in the world'.[734] Yet for some time in the early 2000s, there was a window of opportunity for the Somali state, and it took the form of what amounted to a judicial initiative.

The case of the Union of Islamic Courts

Looking briefly at the case of Somalia is instructive. It is no coincidence that the title of the movement was the 'Union of Islamic Courts'. As will be seen, like the Taliban of Afghanistan, this was a reaction to rampant rapacious warlordism.[735]

Whether the Union of Islamic Courts (UIC) was in fact 'associated with Al Qaeda' at the time it swept the country is a matter of serious doubt.[736] What is certainly true is that its

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[732] Mampilly, *Rebel Rulers*, p242

[733] From 2011 to 2013, Afghanistan was assessed by Transparency International as the most corrupt country in the world. Cf Transparency International, 'Corruption Perceptions Index' (annual), available at http://www.transparency.org/cpi2013/results

[734] ibid. The three states are equal 182nd

[735] Channel 4, 'Somalia's Islamic Courts', *Unreported World* (Reporter Aidan Hartley), Channel 4, Series 12, available at http://www.sidereel.com/Unreported_World/season-12/episode-10

successor as a de facto aspirant regime, the so-called *shabab*, which grew up in direct response to US actions, most certainly does.

What is interesting and significant about the UIC is that it crystallised the importance of dispute resolution in societies such as that in Somalia. The extent to which it was both remarkable and significant warrants a little further elucidation, as the Somali world is a fine example of how important alternative dispute resolution structures can be politically.

Interestingly, the commonly argued case of Somalia as a dangerous failed state may be true, but only because it became a self-fulfilling fear when the US aligned itself with Ethiopia to topple the UIC. Verhoeven links the failed state narrative of the dangers of states not supplying Weberian goods with post-Cold War ideas of hegemonism and interventionism.[737] Of course, Afghanistan has become the central player in this story of state against chaos. According to the view evinced in this world, 'justice' is seen as a service to be provided by the state, like any other, and is capable of being exported by technocratic experts. There is another way, however, and this, too, is addressed by Verhoeven:

> Only when bottom-up institutional responses to state-failure are taken seriously can human security questions be addressed effectively, in Somalia and elsewhere and institutionalised in such outfits as the 'Stabilisation Unit'... for the international community, legitimate authority quasi-automatically means a legitimate state; post-conflict reconstruction always focuses on the rebuilding of state-institutions and state-authority, and seldom explores how in local communities non-state forms of governance might be considered to be far more legitimate than classical government.[738]

The growth of the UIC was catalysed by a dispute over control of a port and was bound up in the intensely (for outsiders) complex world of Somali clan interests and commensurate territorial and business rivalry.[739] Somali society, being clan based, is not necessarily

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[736] Barnes, Cedric and Hassan, Harun, 'The rise and fall of Mogadishu's Islamic Courts', *Journal of Eastern African Studies*, 1:2 (2007), pp151–160,

[737] Verhoeven, Harry, 'The self-fulfilling prophecy of failed states: Somalia, state collapse and the Global War on Terror', *Journal of Eastern African Studies*, 3:3 (2009), pp405–425

[738] ibid., p407

[739] The port of El Ma'an. See Barnes and Hassan, 'Rise and fall', pp153–154 for details

conducive to Western state models either of governance or indeed of dispute resolution: 'The basic social fabric of Somalia militates against centralisation, and for this reason it is characterised by parochial or sectarian interests.'[740] For a short time, the UIC, if it did not quite transcend, then it at least managed these interests for the clear benefit of a society that had been destroyed as a political entity for the previous 16 years.

The genius, if it may be called that, of the Union of Islamic Courts was that they combined Somali traditions of community justice (known as *xeer*) with Islamic legal practices.[741] The courts were the product of Somalia's

> two most common denominators: clan and the traditional Islamic faith. The Islamist section in the courts did not have a particular agenda and were not presided over by expert Islamic judges, nor were they supporters of any specific school of Islamic law. The authority vested in the courts emanated from the decisions of the clan elders who established the institution and for enforcement of the courts' judgments they relied on militias recruited from the local clans. The authority, therefore, derived primarily from Somali customary law known as *xeer*. Sharia was applied by default since no other legal system had functioned well since the collapse of the government in 1991.[742]

Aidan Hartley, in his *Unreported World*, reported that the UIC undertook

> … serious efforts to get the economy going again, arrested pirates, ended banditry, subjected pirates and bandits to Sharia. Sheikh Sharif declared the waters of Somalia safe. Crime was severely curtailed with its attendant effects on security and popular consent. The courts handed down severe *huddud* sentences. Initially the courts were localised and decentralised; this is not surprising. Every neighbourhood had its own court.[743]

[740] Mwangi, Oscar Gwakou, 'The Union of Islamic Courts and security governance in Somalia', *African Security Review*, 19:1 (2010), p92
[741] ibid., passim
[742] ibid. p91
[743] Channel 4, 'Somalia's Islamic Courts'

The UIC brought basic social and Sharia legal services:

> UIC rule brought very tangible benefits to the population and gave the Islamists the aura of a national liberation movement; human security improved remarkably, as girls went back to school, transaction costs for business shrunk, entire neighbourhoods were thoroughly cleaned and Mogadishu's streets became safe again at night.[744]

Hartley found the courts dealing with civil matters and the return of property to owners who had been dispossessed.

Governance, if it might be called that, was mainly confined to the provision of dispute resolution and the enforcement of decisions. While some courts were connected to jihadists, many centred on the various clans. All the courts, of whatever clan, answered to a Supreme Council. In June 2006, they defeated the incumbent warlords to create what amounted to a government. At the very least, they were seen to have provided security in a country where none had been available, save localised gang governance by warlords. 'They restored peace for the first time in 15 years', and as a result began to garner support from business and hitherto unaligned clan leaders.[745]

But it lasted only six months. Unfortunately, the benefits that were clear to Somalis were less than attractive to US and Ethiopian interests. In the words of the assistant secretary of state for African affairs:

> We remain deeply troubled that foreign terrorists associated with al-Qaida have succeeded in establishing a safe haven in Somalia. Somalia's continued exploitation by terrorist elements threatens the stability of the entire Horn of Africa. We will therefore take strong measures to deny terrorists safe haven in Somalia, as well as the ability to plan and operate from Somalia. In this regard, the US continues to work

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[744] Verhoeven, 'The self-fulfilling prophecy of failed states', p417
[745] Mwangi, 'Union of Islamic Courts', p91

> with East African countries to build their capacity to counter terrorism and criminality that originates in Somalia.[746]

In fairness to the United States and its client/ally, Ethiopia, developments in Somalia might from their perspective have been seen as threatening. One clan, the Darod (one of the five dominant Somali clans) had become influenced by jihadism and had declared war on Christian Ethiopia. The internal politics of the increased influence of the Al Shabab movement and its allied groups are very complex and beyond the scope of this thesis.[747] Nonetheless, what is a matter for debate is the extent to which the reaction on the part of the United States and its failure to understand not only the internal dynamics of Somalia, but also the intense and ancient rivalry of the 'Highlanders' of Ethiopia and Somalia, made the situation worse.

Genuine Ethiopian fear of Somali jihadist influence in its Somali region resulted in a full-scale invasion of Somalia by Ethiopia, supported by the United States. This brought the end of the UIC and the relapse of Somalia into clan-driven political chaos. In turn the situation was made worse by the greatly increased influence of al Shabab, which continues today throughout much of Somalia, especially its south.

The challenge of pluralism

The issue of having more than one legal or dispute resolution system in the same area is known as 'legal pluralism'. Some theorists regarded 'legal centralism' as a counterpoint to pluralism – i.e. the idea that one, usually state law, 'is and should be the law of the state, uniform for all persons exclusive of all other law and administered by a single set of state institutions'.[748] Others see legal centralism as 'a myth, an ideal, a claim, an illusion'.[749] As discussed in Chapter 1, the fact is that, in most (or indeed all) societies, there are multiple sources of dispute resolution.

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[746] Verhoeven, 'Self-fulfilling prophecy of failed states', p416, quoting Frazer, Testimony before the United States Senate, 6 February 2007, at http://www.state.gov/p/af/rls/rm/80122.htm

[747] Hansen, Stig Jarle, *Al Shabaab in Somalia: The history and ideology of a militant Islamist group 2005–2012* (Hurst, 2013) for a detailed account of Al Shabab

[748] Griffiths, 'What is legal pluralism?', p1

[749] ibid., p4

The field of legal pluralism is large. It is essentially considered (particularly since the 1980s) to be a discrete field of the Anthropology of Law. There is a great deal of literature on it. However, as was pointed out in the introduction, it is only in the last decade that attention has been directed at its role in conflict – and indeed particularly in post-conflict. However, while the term and the academic discourse are relatively recent, the study and practice of rule in pluralist society can be identified as far back as 1772. In that year, a regulation of the East India Company provided: 'In all suits regarding inheritance, marriage, caste and other religious usages and institutions, the laws of the Koran with respect to the mohamedans [*sic*] [etc.] shall be adhered to.'[750]

For the purposes of retaining a modicum of order in colonial territories with apparently multiple sources of legal power, there was an awareness of the need to ensure that conflict was kept to a minimum. For over a century there was extensive discourse and writing on how colonial administrators should deal (and indeed had dealt) with the challenges of what is now called 'customary law'.

In colonial times – essentially the second half of the nineteenth century and the first half of the twentieth – effective rule (or rule that was effective enough to maintain authority) was maintained over huge areas by a small number of administrators with minimum effort in terms of the imposition of 'formal' judicial (or indeed other) governmental functions. Many of the lessons identified by such regimes as the British, French and Ottoman empires have been forgotten in recent 'counterinsurgency' campaigns, which have focused more on 'formal' structures, at the expense of more effective 'light touch' informal provision.

The essence of the technique became known as 'indirect rule' which

> came to require that indigenous law [what might now be called 'customary law'] be discovered, written down and made available for implementation. The assumption was that 'native law' could be recorded as a set of rules about how social life should be ordered and then applied by magistrates in the settlement of disputes.[751]

[750] Ordinance of the East Indian Company 1772, quoted in ibid., p6
[751] Pirie, *Anthropology of Law*, p46

In almost all the areas of Africa and Asia governed by the British, this was the technique used, and (as will be seen) its heritage in written law and constitutions worldwide is considerable.

The key work on 'indirect rule' was Frederick Lugard's *Dual Mandate*.[752] This is a long discourse about the nature of the imperial task, particularly in Africa, based on a deep and long engagement as a colonial administrator – mainly, but not exclusively, in West Africa.[753] 'Indirect rule', as outlined in the book (where the term itself is rarely applied) amounted at the political level to devolved authority.[754]

Lugard himself stated that '[p]rinciples do not change, but their mode of application should vary with the customs, the traditions and the prejudices of each (administrative) unit'.[755] There has been much debate as to what value jurisprudentially or morally should be placed on this approach. One highly regarded commentator characterises it thus: 'The "customary law" recognised in colonial legislation and applied in the new "native courts" was a tendentious montage. Insecurely linked to the past it was a system supportive of colonial rule entrenching elders over juniors, men over women.'[756] While indirect rule was indeed a matter of ad hoc improvisation, it made 'a virtue of necessity'.[757]

There are considerable dangers in overemphasising the British imperial experience or indeed its success. As senior World Bank official and academic commentator on development and law has said Doug Porter puts it the 'Dual Mandate' model of customary authority, with its inherent emphasis of 'recognition' of local authority 'constituted a single model of customary authority across Africa that mirrored images of traditional European monarchy and patriarchy.'[758] He points out that when this approach encountered such fiercely autocephalous non-state societies such as the Yoruba and Ibo 'this model came to grief'.[759]

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[752] Lugard, *Dual Mandate*
[753] Lugard also served as an administrator in Hong Kong from 1905 to 1912
[754] ibid., pp199–200, where the system that was applied to Northern Nigeria is described. Today, this is the heartland of Boko Haram.
[755] Ibid p 194
[756] Roberts, *Order and Dispute*, p163
[757] ibid., p164
[758] Porter, Doug in Tamanaha et al 'Legal *Pluralism and Development*' at p166
[759] Ibid

This may indeed be so. In addition, it was the case that unpalatable societal norms were entrenched and minorities subjugated – things that today are utterly unacceptable. However, what indirect rule also did (albeit virtue from necessity) was to maintain a modicum of control, and indeed retain a modicum of acceptability, so that insurgencies were not able to get the necessary purchase in terms of legitimacy to sustain themselves. The tension between quixotic maintenance of firmly held (if metropolitan) ideals and strategic objectives was almost always resolved in favour of the latter in the British imperial project. It is true, as Santos has said, that 'there is nothing inherently good, progressive or emancipatory about legal pluralism'.[760] Nonetheless, the same might be said of legal centralism. For the strategic purposes of fighting an insurgency – or indeed preventing insurgency, as the British and French colonial authorities wanted to do[761] – what mattered was 'does it work?'.

It was not only European imperial rulers who arrived at versions of indirect rule. In Ottoman Albania, particularly in the north the customary law known as the Kanun Lekë Dukagjini[762] was deeply embedded in the culture and society. This was a system founded on notions of honour and was not at all dissimilar to that found in contemporary Pashtun Afghanistan. There was a sense of Islamic polity, at least in those areas where Albanians were Muslim (by no means all of the country).[763] However, despite the largely hands-off rule of the Ottomans, they did take exception to the 'blood feud', which, according to some commentators, claimed up to 19 per cent of male deaths and certainly constituted the major single cause of death for young males.[764] But there was little that could be done about it. The tribes of the north of Albania in particular were regarded as almost impossible to control. It was the same in Yemen, where notions of blood feud and revenge were far stronger than centralising Ottoman governance and law. The Ottoman form of governance

[760] Santos, Boaventura de Sousa, *Toward a New Common Sense: Law, globalisation and emancipation* (Butterworth, 2002), p114–115, quoted by Griffiths, 'What is legal pluralism?', p7

[761] French colonial administration did not devolve power to local potentates; they tended to be subordinate to the local political officer; see Crowder, Michael, 'Indirect rule: French and British style', *Journal of the International African Institute*, 34:3 (July 1964), p197

[762] Hasluck, Margaret, 'The Albanian blood feud', in Paul Bohannan, *Law and Warfare: Studies in the anthropology of conflict* (Natural History Press, 1967), p381

[763] Gawrych, George, *The Crescent and the Eagle (1871–1913): Ottoman rule, Islam and the Albanians* (IB Tauris, 2006

[764] ibid., p30

in such places was minimalist. It relied on co-optation of local elites. There were concerted efforts to eliminate the old ways of the Kanun during the reign of King Zog in the 1920s and 1930s, accompanied by the deployment of some Western police experts.[765] This had minimal success. When the communist government took power in 1945, there was a largely successful effort, largely accompanied by extensive repression, to extend the control of central government (including criminal legal jurisdiction) over the previously 'ungoverned' space of Albania, particularly in the north of the country.

Thomas Kuehn, in his survey of Ottoman governance in Yemen in the nineteenth century, says:

> Ottoman administrators came to insist that because of their 'backwardness' the locals had to be governed according to their customs and dispositions. The claims that a 'culturally inferior people' could, however, be mastered through a knowledge of their ways can also be read as a compensatory strategy that helped Ottoman officials come to terms with the discrepancy between the ideology of a civilising mission and the realities on the ground.[766]

The Ottoman approach to 'ungoverned space' was consequently very similar to the ideas implemented by British administrators. There are interesting cognates in the way that, after a long period of trial and error, Ethiopia has, for the moment at least, settled upon a system of de facto 'indirect rule' at least over the difficult Somali Region.[767] This is an area described

[765] Oakley-Hill, David, *An Englishman in Albania: Memoirs of a British officer 1929–1955* (Centre for Albanian Studies, 2002)

[766] Kuehn, Thomas, *Empire, Islam and the Politics of Difference, Yemen 1849-1918* (Brill, 2011), p144–145; Kuehn takes the view that, unlike the British and French, it was not the policy, or at least the intention, of the Ottomans to institutionalise the differences between the rulers and the ruled and create a permanent or long-lasting hierarchical order. It was the intention of the Ottoman central government to develop modes of governance that on the contrary would bring the conquered peoples into the Ottoman polity. In places such as Northern Albania and Yemen, this was not possible

[767] Abdo, 'Legal pluralism'; Hagmann, Tobias, 'The return of garrison rule to Ethiopia', Paper presented at G.M. Carter conference 'The politics of permanent flux: state-society relations in the Horn of Africa', 15–16 March 2013, University of Florida, Gainesville. This paper describes an Ethiopian 'Forward Approach' to its intractable Somali Region with military, special police and other security bodies garrisoned in an area where legal and political authority is essentially devolved to clan interests ostensibly favourable to Ethiopian government interests. For an account of Somali society and law, see Lewis and Samatar, *Pastoral Democracy*; and for a somewhat libertarian description of Somali Law (known as *xeer*) see van Notten, Michael, *The Law of the Somalis* (Red Sea Press, 2005)

by one commentator as 'a shameful stain, the poison at the heart of the Horn of Africa'.[768]

The ideas of indirect rule, then, are still very much alive. For them to succeed, in the words of a leading contemporary commentator on law and insurgency:

> The implicit bargain struck between the center and the communities is that the local actors recognize the authority of the central government and the central government grants the local actors considerable autonomy.[769]

For that to occur in turn requires a relatively strong local polity, secure enough in its independence to ensure an adequate degree of obedience, and compliant enough with the centre to ensure minimum interference. It requires personnel who are intimately familiar with local norms and practices. This is particularly the case when those actors are themselves foreign. And as has been seen, the 'exogenous' ruler can himself become a cause of insurgency.

The politicals

The means by which the British and other colonial powers administered these policies was through the locally appointed 'political officer'. In the British and French cases these men were carefully selected from an academic and often military elite.[770] On occasion they might be picked from 'native' leaders who had undergone a Western education.[771]

Rory Stewart, in his work on contemporary interventions, counterpoints the experience of today's inheritors of the tradition of the 'politicals' of the Indian civil service. He relates the career of John Lawrence. Having studied Indian languages and literature in India for three years, he was given his first posting in the service – to Delhi, where he served for 16 years. 'He spent that posting taking measurements in agricultural fields and hearing domestic

[768] Interview with Sarah Vaughan, September 2014
[769] Sitaraman, *Counterinsurgent's Constitution*, p178
[770] See, for example, Crowder, 'Indirect rule', p197
[771] See ibid. and Tripodi, Christian, , *Edge of Empire: The British political officer and tribal administration on the North West Frontier 1877–1947* (Ashgate, 2011)

court cases in local languages.'[772] His next 14 years were spent in the Punjab, involved in all matters of governance. His bailiwick included the 'frontier': 'He came from a system whose career structure repeatedly rewarded experience in country and promoted people who had served in remote posts and displayed detailed knowledge of specific cultures.' Lawrence was by no means an isolated example.

Stewart contrasts such expertise with a contemporary equivalent he met in Afghanistan:

> He, like most international civilians, was an expert in fields that hardly existed as recently as the 1950s, and which are hardly household names today: Governance, gender, conflict resolution, civil society, and public administration. They were not experts on gender and governance in Afghanistan; they were experts in gender and governance in the abstract. They had studied 'lessons learned' by their colleagues in other countries and were aware of international 'best practice'.[773]

There is, though, here a real risk of orientalism. It has been alleged that the views of some historians on the prowess and efficacy of the 'politicals' have been clouded by established views. Douglas Porch suggests that the expertise of many of these 'politicals' amounted to 'parachute expertise',[774] applying imported imperial 'best practices', which consisted generally of alternating between bribes and severe repression, rather than being grounded in true cultural fluency. This is corroborated to some extent by Christian Tripodi, arguably the leading scholar on the history of the 'politicals' on the North West Frontiers of India.[775] None of the much-trumpeted 'cultural fluency' exonerates the 'politicals' of the charge that their actions often in fact amounted to 'imposing incomprehensible decisions on the locals behind an imaginary facade of cultural knowledge', The same applied, he says, to the French 'bureaux Arabes', who were working under similar doctrines to the British in their North African possessions.[776]

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[772] Stewart and Knaus, *Can Intervention Work?*, p22
[773] ibid., p20
[774] Porch, *Counterinsurgency*, p32
[775] Tripodi, Christian, 'Peacemaking through bribes or cultural empathy: the political officer and Britain's strategy towards the North West Frontier 1901–1945', *Journal of Strategic Studies*, 31:1 (February 2008), pp123ff
[776] Centred on the '*bureaux arabes*'

According to Porch, 'Knowing the country might translate into nothing more than superficial platitudes that more or less mirrored the racism and integral nationalism of the age.'[777] He goes on to quote several of the luminaries of the profession, including Lawrence, Gertrude Bell (both of whom worked in the Arab world) and Lord Frederick Lugard, who worked in West Africa:

> The autonomy and power of the political transformed them into a military sub-species who might develop a highly romanticised view of the people they administered, act as their spokesmen and advocate policies that might put them at odds with the military hierarchy, not to mention other advisors, with their own psychological and emotional attachments to 'their' tribe.[778]

As Porch concedes, though, the aim and purpose of the 'politicals' was, in essence, not to act as exemplars of culturally assimilated experts or anthropologists of their day, but to 'keep a lid' on violence and disruption.[779] There can be little doubt that they tended to succeed in that aim, at least at the tactical level. It should also be said that their 'cultural expertise' was not intended to work only one way. Many of them, indeed the great majority, were former Army officers, and part of the trouble they often had with their former military colleagues was in mediating the ways of the British and British Indian armies to the 'natives'. In other words, their cultural knowledge of their own side – with its limits and advantages – was at least as important as the (admittedly often somewhat romanticised) expertise concerning 'their' tribes. Porch's criticisms have force, but perhaps while others have romanticised the role of the 'politicals', there is little benefit to be derived from denigrating what were (as few could deny – not even Porch) highly qualified men, expert in their fields.

One such was the original 'hearts and minds' advocate – a man who had lived most of his life in Victorian India: Robert Sandeman.[780] 'During his time as District Officer and

[777] Porch, *Counterinsurgency*, p33
[778] ibid p 35
[779] ibid. p36
[780] For a full account of Sandeman's life, see Tucker, A.L.F., 'Sandeman: Peaceful conqueror of Baluchistan' (1921), available at http://archive.org/stream/sirrobertgsandem00tuckrich/sirrobertgsandem00tuckrich_djvu.txt

subsequently Chief Commissioner (a role very similar to Regional Governor), he extended the rule – or, to be precise, influence – of the Raj into Baluchistan. The technique he developed became known as the 'Forward Policy'. Previously this had been somewhat discredited after the disastrous defeat of the British Army in the defiles between the Khyber Pass and Kabul in 1842. Sandeman devised a more subtle way of extending and maintaining control. Using a judicious combination of pay-offs and occasionally force, he extended British rule deep into Baluchistan, rejecting entirely the old attitude of the 'Close Border', which meant defending only the borders and making no effort to extend either them or British influence. Nowadays the method of rule might be described as 'soft touch', as there was little attempt to supplant local governance or laws. Sandeman took the view that British interests and secure borders depended more on ensuring friendly neighbours than on threatening neutral or hostile ones, and conquest by military force was simply not going to achieve that.

The Sandeman system seemed simple: 'You made friends with the tribes, you dealt with them through their chiefs, you paid tribesmen to patrol your communications, you adhered to tribal custom and settled disputes by *jirgas* and not through law courts. You tried to solve all problems peacefully, but you kept an effective military force ready and visible; and from time to time you extended your control by the construction of roads and forts.'[781]

Olaf Caroe, another British political officer, made a bold claim: 'The Raj ticked because on the whole the people recognised the administration liked the people.'[782] While now that claim may seem somewhat simplistic and perhaps even quixotic, it was based on many decades of hard-earned experience. One aspect of Porch's criticism does, however, hit home and has resonance today, when matters of intelligence and their application to Afghanistan in particular are concerned: 'As the Raj grew, information became mangled, fragmented, dated, increasingly esoteric and useless as it passed through congealed layers of bureaucracy. While the Mughals [the previous ruling dynasty in India] had used information to inform power, exercise moral suasion and increase legitimacy, the British

[781] David Gilmour, *The Ruling Caste: Imperial lives in the Victorian Raj* (Pimlico, 2007), p 171
[782] Imperial War Museum interview with Olaf Caroe

operationalised it in the police and army.'[783] In other words, damagingly, intelligence began to be seen as a matter relevant primarily to security. The importance of wider knowledge and awareness was under-prioritised and continues to be under-prioritised.[784]

Although General Templer believed he was responsible for that 'nauseating phrase I think I invented', he was not. The famous term 'hearts and minds' is not a recent invention. It was first coined in this context by one C.E. Bruce, a man who had spent 30 years on the Frontier as an administrator – even longer than Lawrence: 'To be successful on the frontier, a man has to deal with the hearts and minds of the people and not their fears.' Even if that somewhat overworked phrase is accepted on face value, surely in order to 'deal with' those hearts and minds, one should have some understanding of what such organs actually want, and to understand that such desires may not be in accordance with Western mores.

Colonial legal solutions

In some ways, the foregoing discussion is concerned at least as much with governance as it is with lawfare. That experience of the 'politicals' fed into profoundly informed debate on how 'indirect' the British policies should be. This debate , of which Lugard's '*Dual Mandate*' was an African expression, was especially fierce around the borders with Afghanistan. Much of this was caused by (or rather occasioned by) the legal means by which the Pashtun people govern themselves, based on the code which defines them, the Pashtunwali. There was no role for the state in this code. It certainly did not accept the basic tenets of British or Western law, whose central pillar is that it is for the state, not the individual, to correct criminal wrongs.

The Raj dealt with this in legal terms: not by trying to impose an alien way of thought, but by accepting that it was not going to change and incorporating it into its own law, in the Frontier Crimes Regulations (FCR – see below), which allowed the tribes themselves to deal with crimes. This was a framework which exists, not without considerable controversy, even today. The cultural supremacism we see today in the form of legal centralism was, to all

[783] Porch, *Counterinsurgency*, p36
[784] For an extended discussion of the importance of 'holistic intelligence', see Ledwidge, *Losing Small Wars,* pp223–230

practical purposes, virtually absent.

The Frontier Crimes Regulations went through several iterations (in 1873 and 1876) before being redrafted in 1947, prior to the independence of India and Pakistan. As matters stand, constitutionally the President of Pakistan has direct executive authority.[785] That authority is exercised though political agents, direct successors of the political officers of the Raj. Indeed the 'agents' were directly subordinate to the very few political officers. At the time of the Raj, the agents were almost always ethnically Indian (or now Pakistani) in any event. Clearly this ensured a relatively smooth transition of authority in the tribal areas.

The Frontier Crimes Regulations comprise lengthy and complex provisions, but may be summarised as permitting tribal authorities in tribal areas bordering Afghanistan[786] to dispense justice in what outsiders would call criminal matters, in a manner that those across the border and working for the 'international community' would call 'informal'. Because there is no separate category of 'crime' in Pashtunwali, the FCR rules often adjudicate in other disputes as well, by way of *jirga*. This is to say by means of *jirgas*. Those decisions are reported to the political agent for validation and approval. The FCR are the subject of constant criticism by Pakistani courts and NGOs for their failure to conform to any notion, national or international, of human rights standards.[787] This has been the case for decades. However, workable alternatives are few indeed. For present purposes, what the FCR do is allow government to ensure some form of oversight in territories which have defied such oversight for centuries and continue to defy it today in Afghanistan.

Two points arise out of the FCR and their application. First, they are founded on well over a century of negotiation, both literal and military, learned discussion and debate, and hard practical experience. This system is not burdened by any difficulty arising out of what legal development practitioner Thomas Carothers has termed the 'problem of knowledge':[788]

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[785] Under article 247(3) of the Constitution of 1973, no act of Parliament is applicable to the FATA or any part thereof unless the President of Pakistan so directs. He rules directly and elected representatives have no say in the governance of the FATA

[786] FATA comprises seven agencies and six frontier regions, including Waziristan

[787] A former Chief Justice of the Supreme Court of Pakistan, Alvin Robert Cornelius, declared the FCR to be 'obnoxious to all recognised modern principles governing the dispensation of justice'; *Sumunder* v *State* (PLD 1954 FC 228)

[788] Carothers, Thomas, 'Promoting the rule of law abroad: the problem of knowledge', in *Critical Mission: Essays on democracy promotion* (Carnegie Endowment, 2004), pp15ff

however beset it may be by other problems concerning human rights, the FCR have been shown to function.[789]

This somewhat basic discussion of pre-1947 British practices on the North West Frontier of the Empire has two purposes. First, it illustrates a central argument of this thesis that dispute resolution is central to governance. The key role of the political was to mediate disputes. The central debate of the Frontier – 'forward' versus 'close' – revolved around how governance should be exercised. The solution arrived at – and the solution which, to a very great extent, still subsists – was what amounted to a modified 'close' policy, for the simple reason that it proved impossible to extend state structures, beginning with courts, to those frontier areas. To return to the quote above on the subject of the Sandeman system: 'You made friends with the tribes, you dealt with them through their chiefs, you paid tribesmen to patrol your communications, you adhered to tribal custom and settled disputes by *jirgas* and not through law courts. You tried to solve all problems peacefully, but you kept an effective military force ready and visible.'[790] The only part of the Sandeman system in Baluchistan which did not comfortably translate to the Pashtun lands was the gradual extension of forts and military infrastructure.

Similar approaches were taken to the continuation of indigenous legal practices throughout the British imperial project.

In Sudan, for example, the analogue to the Frontier Crimes Regulations was the Chiefs Courts Ordinance of 1931.[791] This followed the Civil Justice Ordinance 1929, which had similar effect. Rather than attempting the task of imposing a 'state' legal model, it accepted the authority of the Customary Courts of Sudan. There was a qualification to this acceptance:

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[789] Simpson, 'Round up the usual suspects', p648; The Criminal Tribes Act of Burma allowed the authorities to categorise a tribe, gang or class 'addicted to the systematic commission of non-bailable offences' as a 'criminal tribe'. Various consequences followed: for example, the entire tribe could be fingerprinted and each person's residence controlled. In parts of upper Burma, the entire tribe could be detained; see 1 Burma Code 401; India Act VI (1924)

[790] Gilmour, *Ruling Caste*, p171

[791] Chiefs Courts Ordinance 1931 was itself a modification of the Civil Courts Ordinance of 1929. For a full discussion, see Jok, Aleu et al., *A Study of Customary Law in Southern Sudan* (World Vision and South Sudan Secretariat on Legal and Constitutional Affairs, 2004). For a complete discussion of the impact of this and other similar enactments in Southern Sudan and their legacy see Fadlalla, Mohammed, *The Customary Laws of Southern Sudan, Customary Law of Dinka and Nuer* (iUniverse, 2009)

> The Chiefs' Court shall administer the Native Law and Customs prevailing in the area over which the Court exercises its jurisdiction provided that such Native Law and Custom is not contrary to justice, morality or order.[792]

The Chiefs Courts Ordinance was 'the most important legal milestone in Sudanese history in the North as well as the South', setting the tone for the approach to be taken in all parts of Sudan.[793] Although repealed in 1977, after Sudanese independence, the central importance of customary law was recognised by the People's Local Courts Act 1977. In South Sudan, the 1929 Civil Justice Ordinance was absorbed in its essence into the New South Sudanese legal system with the introduction of the Local Government Act 2009, which codifies the role and function of customary courts.[794] At the time of the British occupation of Sudan, there was no significant resistance, and therefore little or nothing in the way of 'insurgency'. It is argued here that the fact that there was no attempt to impose 'state' forms of justice and governance on a society that centred on customary justice may have played a role in ensuring that there was no such insurgency, as the added casus belli of imposed rule was not present. To that extent, what was in fact an 'exogenous' government could credibly take the form of an endogenous one. As anthropologist of law Simon Roberts puts it:

> What was perhaps distinctive of the British colonial project was the concurrent imagination and reconstruction abroad of a metropolitan legal order *and* the making of explicit arrangements for the qualified survival of local governmental arrangements and normative orders.[795]

In a chapter in *Customary Justice and the Rule of Law in War Torn Societies* Francis Deng observes that the years since British rule ended have brought incremental Islamisation, civil war and intense, continuing conflict. Nonetheless the legacy of the Sudanese version of the Dual Mandate in the south of the country remains strong.[796] He quotes a senior South Sudanese judge, Judge Biong Mijak Deng: 'The first colonialists – the British, were to some extent more lenient, merciful and sympathetic to our traditions than our second colonialists

[792] Section 7 Chiefs Courts Ordinance 1931; see Jok et al., *Study of Customary Law*, p14
[793] Fadlalla, *Customary Laws*, p21
[794] South Sudan Local Government Act 2009, section 98(1)
[795] Roberts, *Order and Dispute*, pxiii
[796] Deng, Francis M., 'Customary law in the cross fire of Sudan's war of identities', in Deborah Isser (ed.), *Customary Justice and the Rule of Law in War-Torn Societies* (United States Institute of Peace, 2011), pp285–323

– the Arab, Muslim minority clique based in the capital Khartoum. I for one thank the British for protecting our culture, identity and customs.'[797] Clearly that statement is rather loaded with presumptions and the legacy of recent conflict. Author Francis Deng however makes it very clear that customary law in Southern Sudan has retained a very strong influence in the country, despite the years of conflict.

From the above it may be clear that developing and operating such a legal strategy requires a fairly deep knowledge of the environment in which the insurgency is taking place. This might be characterised in military terms as 'intelligence preparation of the battlespace'. This is exactly the form of knowledge possessed by many of the 'politicals' of the British imperial effort. The case being made in this thesis is not a moral defence of colonial 'Dual Mandate' thinking. Nor does it advocate a particularly positive approach to the imperial legacy. Rather it aspires to demonstrate that in some areas the 'Dual Mandate' approach, as adopted in various forms by governors of 'ungoverned space', acted as a means of preventing insurgency, and indeed as a counterinsurgency weapon, devolving as it did a great degree of practical authority to deeply embedded and arguably legitimate institutions.[798]

Notwithstanding Porch's points, it is true that many advisors or politicals, at least when compared to those deployed on today's operations, were knowledgeable and aware of the environment within which they worked and their approaches represented a real effort to innovate and adapt to their environments. However, a case can be made that Stewart's complaint about the supposed 'generic' knowledge of current 'experts' might also be relevant to imperial administrators.

In his study of the British experience in administering Iraq in the early twentieth century, *Inventing Iraq*, Toby Dodge expresses great reservations about the capabilities of such administrators:

[797] ibid., p307

[798] A case can be made that the current Ethiopian 'ethnic federalist' state is adopting a similar approach to the government of its regions. This is an intensely contested and controversial arrangement

> Inserted into an unfamiliar society and charged with building the institutions of a modern state, British colonial officials had little choice but to strive to understand Iraq in terms that were familiar to them.[799]

What is particularly interesting about this observation is that it might almost have been made about contemporary 'stabilisation' officers and officials. Dodge's particular point is that many of the colonial officers carried their experience of India with them to Iraq: 'The general influence of colonial India on those serving in Iraq is hard to over-estimate.'[800] They did so, Dodge argues compellingly, with extremely damaging effect, particularly with respect to the way they imported ideas and approaches concerning land tenure and law. As briefly noted in the previous chapter, this, Dodge suggests, laid the foundation for problems in land tenure that persist to this day. Such experience as British-Indian administrators had was no more applicable in post-Ottoman Mesopotamia than it was in Victorian Britain.

As observed above, other commentators have attacked the characterisation of these officers as highly effective operators. As we have seen, Douglas Porch calls their knowledge 'parachute expertise', replete with orientalist presumptions. Nonetheless, the Pakistani, West African and Sudanese experiences would tend to show that the solutions arrived at (admittedly after many decades of controversy) were and are sustained in their essence. Why this may be is beyond the remit of this thesis; however, though as individuals these officials may have had their faults, at least the corporate knowledge of the institutions they served was very great. Furthermore, there was clearly an element of trial and error that took place over many decades in all imperial possessions, and this institutional learning fed into the legal approach taken to support the aims of the missions. This applies particularly in areas where the 'counterinsurgents' are indeed of the same nationality and background as the 'insurgents'.

The current approach: stabilisation and the 'rule of law'

The contemporary avatar of the imperial state-building project in conflict-affected states is called 'stabilisation'. This in turn is currently, in doctrine, carried out by means of what was,

[799] Dodge, *Inventing Iraq*
[800] ibid., p120

until recently, named the 'comprehensive approach' (and is now generally termed the 'integrated' approach). Such an 'approach'

> refers to people from different institutions (with particular reference to civilian and military institutions) working together at several levels to achieve common aims. An integrated approach recognises that no one government department has a monopoly over responses to the challenges of stabilisation contexts and that by making best use of the broad range of knowledge, skills and assets of government departments, integrated efforts should be mutually reinforcing.[801]

Western doctrine and practice in dealing with all civilian aspects of conflict is extensively expounded in military[802] and, to a lesser extent, civilian[803] doctrine. The 'comprehensive approach', which entered the vocabulary of British government in 2006, tended to be viewed with suspicion by the Foreign and Commonwealth Office and also (perhaps surprisingly) the Department for International Development. Although its central idea is a 'whole of government approach', Professor Hew Strachan observed that: 'For them it was stamped "Made in the Ministry of Defence".' The Ministry of Defence enjoyed a much larger budget than either the Foreign and Commonwealth Office or DFID, and Strachan suggested that it may be trying to take them over.[804]

Critics of British efforts Robert Egnell and David Ucko agree:

> We are left with the 'comprehensive approach', a mere rhetorical device that purports to mobilize a massive interdepartmental bureaucracy, much of which is domestically focused, for the purpose of co-ordinated campaigns conducted abroad.[805]

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[801] Definition derived from http://www.stabilisationunit.gov.uk/component/docman/cat_view/163-thematic/190-comprehensive-integrated-approach.html?Itemid=230

[802] See, for example, JDP 3-40; for the NATO approach see http://www.nato.int/cps/en/natolive/topics_51633.htm

[803] OECD, *Whole of Government Approaches to Fragile States* (2006), available at http://www.oecd.org/development/incaf/37826256.pdf

[804] Strachan, *British Generals in Blair's Wars*, p340

[805] Ucko and Egnell, *Counterinsurgency in Crisis*, p38

There can be little doubt about the extensive ambition inherent in the idea of 'stabilisation'. In his *Counterinsurgent's Constitution*, Ganesh Sitaraman, while generally accepting many of the premises of 'rule of law development', albeit with a highly nuanced perspective, acknowledges that '[c]reating a resilient full-spectrum order may appear virtually impossible across a vast territory'.[806] The necessary resources for state-building are substantial, but are rarely forthcoming, either in terms of material or human resources. Time is also a major issue – perhaps the most important, as most Western-type polities took centuries to develop. In current interventions 'external actors often seek to exit immediately despite the fact that state-building is a long term process'.[807] An advisor to a senior Afghan minister responsible for the justice sector told me 'helping a country with its justice system is so fraught with conflict risks it has to have a long term approach and a consistency of multi agency donor and international community effort. However it is vital to understand that ownership of these dynamics must be local. It is also important to see that 'stabilisation' is not state-building.'[808]

While they are present in their theatres of operation, the current approach is strongly focused on notions of 'the rule of law', which is said to be 'fundamental to legitimate governance'.[809]

What is 'rule of law'?

The term 'rule of law' has been referred to several times in this thesis. What is the 'rule of law' and how does it fit into an idea of lawfare in the context of insurgency and counterinsurgency, as understood today?

Credit for the term 'rule of law' in English has generally been given to the nineteenth-century jurist, Professor A.V. Dicey. He traced the idea back to Aristotle, who said that it was 'better for the law to rule than one of the citizens', and went on 'so that even the guardians of the laws are obeying the laws'.[810]

[806] Sitaraman, *Counterinsurgent's Constitution*, p164
[807] ibid., p157
[808] Interview with Lara Griffith, Development Consultant
[809] JDP 3-40, p6. Current US military doctrine has a very similar approach
[810] Aristotle, *Politics and the Athenian Constitution*, trans. John Warrington (JM Dent, 1959), p130

Since Dicey, these principles have come in for significant criticism and have undergone change, although the general ideas remain. Lord Bingham, arguably the leading British judge of the late twentieth century has drawn eight general characteristics of 'rule of law' which are now commonly quoted:

- The law must be accessible and intelligible.
- Questions of rights and liability should be settled by law and not discretion.
- Laws should apply equally to all.
- The law should afford protection for basic human rights.
- There should be reasonable access to courts and mechanisms of justice.
- Ministers should exercise their powers in good faith without exceeding the prescribed limits.
- Adjudicative procedures provided by the state should be fair.
- The state should comply with its obligations in international legal treaty and practice.[811]

Other leading thinkers have come up with slightly different formulations.[812] It may well be that these definitions of 'rule of law' are adequate for Western, or Western-type systems, but simply not applicable to systems and societal norms outside the 'Western paradigm'. There is extensive debate in the legal developmental literature concerning the validity of the 'Rule of Law' in societies where the state has no legitimate monopoly of force. H Patrick Glenn, a Canadian professor of law and noted expert on legal systems identifies four objections to ideas of the universality of the 'rule of law'.[813] First, as stated above, there is no agreement as to what it is; second, even in its heartland of what he calls the 'Western jurisdictions' the 'rule of law' seems to be failing, especially for the poor due to the sheer costs of going to court; third he claims that there is a disconnect between the idea of 'rule of law' from its implementation in that it is essentially institution-focussed; fourth, it is

[811] Bingham, Tom, *The Rule of Law* (Allen Lane, 2010), passim

[812] Foremost among them Joseph Raz, whose eight (slightly different) principles provide the basis for Bingham's. See Raz, Joseph, 'The rule of law and its virtue', *Law Quarterly Review*, 93 (1977), p195; for the cognoscenti, the current US FM 3-24 posts a similar list: monopoly of force, security of property, the state bound by law, the law itself as stable and sufficiently predictable, access to justice, protection of basic rights and freedoms. FM 3-24, para 13-63

[813] Glenn, H Patrick in Tamanaha et al *Legal Pluralism and Development at p 98*

'unquestionably Western in origin and in content'.[814] Some of these ideas will be explored below in Section 3 below.

In its classical definitions however 'Rule of law' is thought to promote legitimacy in two ways: first, by restraining and defining the parameters of the state, thereby ensuring that a sense of justice is at least possible; and second, by providing a service. That service in turn affects and promotes the idea of a state by reinforcing the state's power. Or so the theory would suggest:

> Thus, when the government provides dispute resolution services it is both providing a beneficial service and simultaneously claiming the authority to resolve disputes. If the population accepts that claim by using the government's dispute resolution services, their perception of the government is likely enhanced by the value of the service and the government's legitimacy is simultaneously enhanced as against all rivals.[815]

Rule of law and the problem of knowledge

'And most difficult of all they came armed with laws and regulations which had not necessarily any relevance whatever to the standards by which a Pathan society lived.'[816]

Moving from governance in general to the specifics of legal reform in the contemporary context, the field of assistance related to the justice systems of 'countries in transition' is known as 'rule of law development'.

This was a strongly evolving activity throughout the 1970s–1990s, with much work done particularly in Latin America. It was with the fall of the Soviet Union and the consequent opening up of the former satellite states of Eastern Europe that the field really began to expand. In some ways, the golden age of 'rule of law development' was the 1990s. During this period, there was a rapid evolution of ideas, as it became clear to many, if not all,

[814] Ibid p 101
[815] Nachbar, 'Counterinsurgency, legitimacy and the rule of law', p27
[816] Caroe, Olaf, *The Pathans* (Oxford, 1958) p347. This is the 'must read' on Pashtun history and culture. It is available in reprint. Caroe can be heard talking about his work at length at the Imperial War Museum tape number IWM 4909/07

practitioners that simply transposing apparently successful Western systems onto evidently unsuccessful 'eastern' justice systems was not working. Even in countries with strong European legal traditions, it became clear that there was more to this task than cutting and pasting constitutions or, even worse, systems of litigation and justice. It was, in fact, entirely analogous to transplanting organs without troubling to assess such matters as blood group.

In the former Soviet Union itself, this idea of simple transplant caused lasting damage, with US-style property systems, derived from medieval English law, being applied in Russia, a country with a legal tradition equal to any other. As experience began to grow in the late 1990s, a more nuanced attitude began to take root, with far more attention being paid to the traditions of the countries themselves. The idea of the 'cookie-cutter approach' as an actively destructive mechanism began to take hold. Rule of law justice development providers 'do not have much interest in non-Western forms of law, in traditional systems of justice, or, in the case of some American rule of law experts, even in civil law'. The result is the 'cookie cutter syndrome'[817] – a 'breathtakingly mechanistic approach involving drafting, construction and training'.[818] In recent interventions, matters have not improved: 'practices … have come to have an almost template-like quality'.[819]

One of the leading theorists and practitioners of 'rule of law development' is Thomas Carothers, who took the view that 'law is not just the sum of courts, legislatures, police, prosecutions and other formal institutions with some direct connection to law'; it is also a 'normative system that resides in the minds of the citizens of a society'.[820] This is as true, incidentally, in the United Kingdom as it is in Afghanistan. It is surely the case that most disputes are resolved before they ever get near the courts, through negotiation or compromise.

Fashions in 'rule of law'

In an essay in *Foreign Affairs* as long ago as 1998, Thomas Carothers observed: 'One cannot get through a foreign policy debate these days without someone proposing the 'rule of law'

[817] For a full and accessible account of this, see Alkon, *The Cookie-Cutter Syndrome*.
[818] Carothers, 'Promoting the rule of law abroad', p21

[819] Clunan and Trinkunas, 'Alternative governance and security', p288
[820] Carothers, 'Promoting the rule of law abroad', p20

as a solution to the world's problems.'[821] Yet over the decades it has become very clear that there is little agreement on what 'rule of law' is, although there has been rather more, paradoxically, on how it should be imposed. What 'rule of law' is and its rationale depends to a large degree on who you are. For those who place stress on commercial development, particularly market advocates, 'rule of law' must promote market ideals, such as sanctity of contract and property. One leading advocate of this is the Peruvian activist Hernando De Soto: 'Simply put, formal law is the foundation of the market system, essential to the development of corporations, limited liability contracts and an adequate business environment.'[822] It has 'become a new credo in the development field that if developing and post-communist countries wish to succeed economically they must develop the rule of law'.[823]

For human rights activists, 'rule of law' is necessary and should be founded on the basic principles to which most Western societies are contracted. This approach focuses on the need for due process, equality before the law, accountability, etc. The focus for human rights advocates is safeguards against executive power.

There is another perspective, in no way recent: what might now be called the 'security' perspective. Within counterinsurgency operations, this is usually packaged under the catch-all shibboleth of 'security sector reform', within which 'rule of law development' is, in practice, subverted to the extent that police and security apparatuses are given the preponderance of attention, often at the expense of the mechanisms necessary to make those apparatuses work in a way consistent with COIN principles. As will be seen, I initially deployed under a 'rule of law' flag (the UK's) that was concerned predominantly with counternarcotics.

Most 'rule of law' specialists are lawyers. The significance of this is that 'lawyers often have relatively formalistic views of legal change and are slow to take up the developmental, process-oriented issues that have come to inform work in other areas of socioeconomic or

[821] Carothers, Thomas, 'The rule of law revival', *Foreign Affairs*, 77 (April 1998), p95, available at http://www.foreignaffairs.com/articles/53809/thomas-carothers/the-rule-of-law-revival
[822] De Soto, Hernando, 'Preface', in Buscaglia, Edgardo et al. (eds), *The Law and Economics of Development* (JAI Press, 1997), pxiv. Cited in Stromseth, Jane, Whipman, David and Brooks, Rosa, *Can Might Make Right? Building the rule of law after military interventions* (Cambridge University Press, 2006), p58
[823] Carothers, 'Promoting the rule of law abroad', p17

socio-political change'. The assumption among lawyers newly involved in the field, understandably perhaps, has been that 'if we build it they will come'.[824] An example of this approach is the case of Major Mullins, outlined below.

Thomas Carothers coined the phrase 'problem of knowledge', and identified several ingredients that would ensure the failure of 'rule of law development' to meet its objectives.[825]

First there is the inherent complexity of 'rule of law development' itself. In any society, the theory and practice of law and legality, or of the settlement of disputes, is intensely complex. That complexity is all the greater when the requirement is to attempt to reform the 'rule of law' – or, as we will see in Afghanistan, to create it in another country. This is the essence of the closely related second problem – the particularity of legal systems,[826] in that most mature systems have evolved organically over many years, sometimes centuries. Such evolution cannot be replicated in a few years.

Third, there is an acute problem of institutional learning. The British armed forces differentiate between a lesson being learned and one being identified, and this distinction is as evident in the 'rule of law' world as it is in the military. The difficulty of institutional learning is compounded by the regular turnover of positions and personnel. In turn, this has a tendency to produce staccato and inconsistent approaches.

Fourth, there is the problem of a lack of applied research: those who write on this topic, says Carothers, have tended not to have been practitioners. Finally, there is the problem that most practitioners in 'rule of law development' have tended to be lawyers, who are trained and conditioned to take formalistic and process-oriented approaches to almost any question. Even the most broad-minded and informed theorists and practitioners make deeply cultural assumptions, and this is as true of lawyers as of any other profession. Supplementing that problem there are the internal tensions of assistance missions themselves, which may contain members with little experience of legal or any other form of development work.

[824] Stromseth et al., *Can Might Make Right?*, p77
[825] Carothers, 'Promoting the rule of law abroad', pp15ff
[826] ibid., p26

These complexities may have contributed to a 'template' approach to 'rule of law development'. In a landmark essay, Golub summarised the problem as follows:

> this 'top-down', state-centered approach concentrates on law reform and government institutions, particularly judiciaries, to build business-friendly legal systems that presumably spur poverty alleviation. Other development organizations use the rule of law (ROL) orthodoxy's state-centered approach to promote such additional goals as good governance and public safety. The problems with the paradigm are not these economic and political goals, per se, but rather its questionable assumptions, unproven impact, and insufficient attention to the legal needs of the disadvantaged.[827]

As will be seen, it is evident that ten years after those words were written, this is the dominant approach to counterinsurgent lawfare in insurgency zones.

Military lawyers have become heavily involved in the 'rule of law' development world, particularly, but not exclusively, in operational combat zones. 'Rule of law' became something of a fashionable additional construct to the counterinsurgency campaign in Afghanistan in 2009. Handbooks were drafted and printed.[828] 'Rule of law green zones'[829] were proposed and a 'rule of law ambassador' appointed.[830] Vast resources were ploughed into this activity, which acquired a far higher profile in the overall effort. A 'rule of law field

[827] Golub, Stephen, 'Beyond the rule of law orthodoxy: the legal empowerment alternative' (Carnegie Endowment, 2003), available at http://carnegieendowment.org/files/wp41.pdf For an extended conceptual deconstruction of recent rule of law failures, see also Brooks, Rosa, 'The new imperialism: violence, norms and the "rule of law"', *Michigan Law Review*, 101:7 (2003), pp2275-2340. Brooks discusses what she calls 'A string of expensive disappointments' in rule of law promotion

[828] US Center for Law and Military Operations, 'Rule of Law Handbook: A Practitioner's Guide for Judge Advocates' (2011), available at http://www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2011.pdf

[829] 'Commander says rule of law needed to combat Taliban', http://www.army.mil/article/51708/; see also Chesney, Robert, 'General Martins on rule of law green zones, Afghan criminal prosecution, and other updates from the ROLFF in Afghanistan', Lawfare, 10 February 2011, available at http://www.lawfareblog.com/2011/02/general-martins-on-rule-of-lawgreen-zones-afghan-criminal-prosecution-and-other-updates-from-the-rolff-in-afghanistan/

[830] Embassy of the US, Kabul, Afghanistan, 'Coordinating Director of Rule of Law and Law Enforcement', available at http://kabul.usembassy.gov/klemm.html

force' was developed,[831] with a highly conservative approach to 'rule of law' and a strong adherence to the 'rule of law orthodoxy'.

The United States 'Rule of Law Handbook' was produced in at least two editions.[832] This is a comprehensive guide for Judge Advocates of the US Army who are to be deployed on 'rule of law operations'. As an introduction to legal systems that such officers may encounter, it is indeed a comprehensive guide. There are extensive sections on 'key players in rule of law' and 'fiscal considerations' (the systems used by United States government agencies). There are 'theater-specific' sections on Iraq and Afghanistan. There is little, however, on the challenge posed by insurgents and their own countervailing courts systems;[833] nor, interestingly, is there any extended reference to other US doctrine on insurgency, particularly FM 3-24 (necessarily the 2006 edition),[834] with its extensive focus on legitimacy. The result is that there is little linkage made between the 'rule of law' element of operations and the rest of the counterinsurgent effort. Overall, the handbook is a straightforward military restatement of civilian 'rule of law development' ideas, with a strong emphasis on Golub's 'rule of law orthodoxy'.

Section 2 : Contemporary counterinsurgency lawfare: the case of Afghanistan

The Afghan background

The early twentieth-century controversies concerning the 'forward' or 'close' policies in what would now be called the 'ungoverned space' of the North West Frontier have, to some extent, replayed themselves in Afghanistan, as will be seen.[835] The insurgency in Afghanistan over the 13 years from 2001 to 2014 provides an example of how the lack of a coherent and informed 'lawfare' strategy, dovetailing with the absence of a political and military strategy, can allow insurgents to take the conceptual space which counterinsurgency theorists believe to be decisive.

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[831] 'Bridging the Potomac: How a rule of law field force strikes balance between security and development operations', *Small Wars Journal* (25 March 2013), available at http://smallwarsjournal.com/jrnl/art/bridging-the-potomac-how-a-rule-of-law-field-force-strikes-balance-between-security-and-dev

[832] US Center for Law and Military Operations, 'Rule of Law Handbook'

[833] Although see Ledwidge, Frank, 'Justice a center of gravity analysis', in ibid., p251

[834] FM 3-24

[835] For an example of the level of debate, and the experience that lay behind it, see Bruce, C.E., *Waziristan 1936–1937: The problems of the North West Frontiers of India and their solutions* (Gale and Polden, 1938)

Afghanistan's first effective constitution was approved in 1923 under Amanullah Khan. Subsequently, a more comprehensive constitution was passed in 1964 by King Zahir Shah. It is that constitution which formed the basis for the current (2004) version, although there were others in 1977 and 1990. It is fair to say that the only time the country had anything approaching a working judicial system, however ramshackle, was during the reign of Zahir Shah (1933–73). Formal justice was, however, something of an urban phenomenon, with traditional mechanisms continuing to operate at the village level, where the great majority of Afghans live.[836]

The country is now an Islamic republic, where the default legal position (if specific laws or constitutional provisions do not apply) is use of the Sharia. To that extent, the legal system is similar to that of Egypt, and indeed the same Islamic jurisprudential line of authority (Hanafi) is consulted where there are no provisions in the state law. This is the same system that was in use until the late 1970s – essentially until President Daoud was deposed. Quranic punishments were used (*huddud*) and the system more or less functioned, presumably with notional central control. There was a network of judges in each province, some of whom were qualified, but all of whom were (to a greater or lesser extent) knowledgeable about Sharia. It is this Sharia-based system from which the Taliban draw their procedure.

The Soviet invasion

In 1979, the Soviet Union invaded, or intervened to preserve order, depending on one's perspective. The following decade brought the most costly war in terms of lives in Afghanistan's bloody history. The Soviet 40th Army supported an Afghan government and army in what might be called stabilisation operations. While the damage that the Soviets did to Afghanistan is often rightly stressed, what is less frequently related is the commitment the Soviet Union had to the civilian effort. Some of the accounts from the time are redolent of more recent activities. The following was written by a Soviet civilian who had deployed to Afghanistan in support of military efforts:

[836] Barfield et al., 'Clash of two goods', p2

> But now a power had arisen in this land that wanted to drag the people from out of their superstition, to give children the chance to go to school, peasants the possibility to plough their fields with tractors instead of oxen, sworn to see the world directly instead of through the eye slits of the chador.[837]

The Soviet civilian efforts in what would now be called 'stabilisation' were of a scale and nature far greater than that deployed by the more recent coalition. Hundreds of infrastructural projects were completed, and they trained tens of thousands of experts in the Soviet Union.[838] Security was at least manageable in the larger centres. However, as recent events have shown, inputs are not necessarily related to outputs or outcomes. In the justice sector there is little evidence of any remaining legacy of Soviet efforts – save for the many officials with excellent Russian language skills.[839]

How counterinsurgency has met the challenge in Afghanistan

Traditional counterinsurgency of the kind practised in Afghanistan and elsewhere over the last decade has seen justice as part of the entire governmental 'piece': as simply another form of service provision by the government, and one that fits within another huge construct, the 'security sector'. As this thesis attempted to demonstrate in Chapter 3, insurgents often see justice as rather more than that: they see it as a key part of their project to insinuate their control into the society they aspire to rule.

The problems of culture and knowledge are multi-layered and wickedly complex. This is true at the most basic level of 'cultures' and the assumptions carried within them – the imperium, so to speak, of anthropology and, in military terms 'human terrain'. As Carothers points out, however, those cultural assumptions can go deeper. It is here that we get into the deep waters of jurisprudence and the analysis of legal systems. For present purposes we need not wade out too far into those waters.

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[837] Quoted in Braithwaite, Rod, *Afghantsy* (Profile Books, 2011), p149

[838] Robinson, Paul and Dixon, Jay, *Aiding Afghanistan* (Hurst, 2012), p1

[839] As an anecdotal point, almost all the author's contacts in Helmand's security and justice institutions had been trained, often for years, in the Soviet Union and spoke fluent Russian

As seen above, the Western 'rule of law' paradigm is based around some apparently anodyne and straightforward ideas. In most state-based systems these are, at the very least, a recognisable aspiration. Unfortunately, in practice the ideal of an independent and impartial tribunal is far from common. Indeed, east of Vienna it is far more the exception than the reality, with judges and courts being bywords for corruption and venality, and all too often regarded as part of the problem of crime rather than an element in its solution.[840]

'If we build it they will come': the case of Major Mullins

Major Jeffrey Mullins appointed Judge Advocate for the 101st Airborne Division's 4th Brigade Combat Team from March 2008 to March 2009.[841] The Brigade Combat Team was deployed to Regional Command East and based in the Afghan province of Khost. As a military lawyer, Mullins' role was slightly different from the usual operational legal attachment. It is normal on operations for military lawyers to be confined to advising commanders on the legality of their units' actions. This can take many forms: an operational lawyer is often concerned with the legality of the application of armed force in combat, advising on targets and, on occasion, the degree or even type of force that might be legal. There are usually tetchy issues connected to detention practice or policy. British operational lawyers, for example, spend a very great deal of their time writing reports on whether particular use of force has been justified.

Major Mullins' task presumably included all these tasks. Additionally, he was specifically deployed in support of the counterinsurgency mission of his brigade, as part of the International Security Assistance Force (ISAF). They perceived their task in classic counterinsurgency terms, to separate the insurgents from the population. This was interpreted as requiring the brigade to 'support the Afghan government in a manner where the Afghan leaders were at the forefront'. He was granted authority to 'move out aggressively' in developing his 'rule of law' programmes. On the third day of his 15 month deployment, he left his base on a convoy to see for himself what he describes as 'one of the

[840] See, for example, International Crisis Group, 'Reforming Afghanistan's broken judiciary'. Afghanistan's justice system is described as being in a 'catastrophic state of disrepair'

[841] This account is summarised from Major Mullin's essay in US Center for Law and Military Operations, 'Rule of Law Handbook' (2009 edition), available at http://loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2009.pdf, p265

largest rule of law programmes ever initiated in Afghanistan' – the Khost Law Centre, set up as a 'one-stop shop' for judicial and legal services. The centre was funded under the Commander's Emergency Response Program (CERP). This is a scheme under which field commanders are given a considerable sum of money for projects that they feel will be 'consent winning'. There were several other 'rule of law' related activities. One was a continuing legal education project to assist local lawyers in maintaining their skills. Significant investment was made in books and equipment, although, in keeping with the ideal of having as much as possible 'Afghan led', the instruction was delivered by Afghan lawyers. In due course, it was assessed that this training was better delivered in Kabul. There was also an innovative plan to ensure that 'jingly truck' drivers caught stealing promised not to do so again.

Mullins regarded the Khost Justice Centre as his highest-priority project: 'it was the most necessary of the 'rule of law' projects. Insurgents need to be prosecuted and convicted if guilty. Judges and prosecutors need a safe work environment where they are not gunned down walking to work. Afghanistan needs provincial level justice centers in each province.'

There had been attacks on several legal figures in Khost, most notably the fatal shooting of the provincial chief judge. The centre itself was to be constructed in an area 300 yards long and 150 yards wide. It was to contain 13 judicial buildings, including offices for judges, defence lawyers, a pre-trial detention facility for those awaiting trial and disposal, a conference facility and administrative block. There would be a new courthouse, separate office space for lawyers involved in trials and an office for court clerks. 'This became my pet project', Mullins states. After some difficulties gaining approval from the Afghan and US authorities, Mullins began his task.

It was agreed that this was to be an entirely Afghan-run operation, once it was constructed. The US military would have no involvement whatsoever. The project was briefed to Afghan national legal figures in Kabul, including the attorney general and the director of the Supreme Court. It took several months from the last of these meetings for the Afghan figures, in Mullins' words, to 'contemplate the memorandum of agreement that had been presented to them'. There were serious problems with co-ordination of almost every organisational matter, ranging from which department would fund the running costs, to

who was responsible for the security of judges. It seems that these questions were in due course resolved.

One other issue, typical of the practical problems that arise late in such projects, was that there was no well. The Americans solved this problem quickly. In December 2008, the formal agreement handing over the centre to Afghan control was signed. This was now an official Afghan judicial compound: 'The only problem is, no-one is using it.' With a candour quite extraordinary in what amounts to a military manual, Mullins reflects on the failure to make this flagship development work:

> Failing to use the Khost Justice Center has a cost that goes beyond the wasted time and resources that went into building it; building the justice center and not using it is likely worse than not building it in the first place. If, even with a safe, secure location for prosecutions, insurgents are still not being prosecuted, the insurgents have won.[842]

A tactical lawfare perspective: the case of the British in Helmand 2006–14

As if in direct reproach to the Weberian paradigms discussed in Chapter 1, there are and were at least five different entities providing dispute resolution in Helmand and the rest of southern Afghanistan.[843]

1. The Afghan Government's formal judicial system (judges, prosecutors and other Ministry of Justice staff), including *Hukkuk* – a state-funded system of mediation and settlement, largely using Islamic Sharia law as its foundation. It is often the first port of call for those in dispute.
2. Afghan Government officials (usually the District Governor (DG) and District Chief of Police (DCOP)). These officials act to resolve disputes in a similar way to elders.
3. The tribal elders themselves, in the form of *jirgas* or *shuras*. It was this system that was used in the dispute over the treatment of people by police officer 'Khan' (see below). They use Pashtunwali and its procedures to ground their decisions.

[842] ibid., p269

[843] Fearon, Kate, 'Pragmatism, proximity and Pashtunwali: informal justice at the district level in Helmand Province', in P. Albrecht, H.M. Kyed, D. Isser and E. Harper (eds), *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform* (International Development Law Organization, 2011), p11

4. The mullahs, in their de officio capacity as interpreters of Sharia. This is the traditional method used in Afghanistan for the resolution of legal disputes. Disputes are settled using much the same procedure as that used by the Taliban. This system, however, like the Pashtunwali, has fallen into disuse, as traditional society has fragmented due to the constant wars, which have resulted in a constant flow of refugees.[844]
5. The Taliban, who, as has been seen, have taken advantage of the weaknesses of the other forms of justice provision.

An illustration of the way in which there can be what amounts to 'forum-shopping' in this kind of legal and judicial environment is illustrated by the example of 'Abdul' in 2007:

> 'Abdul', an employee of the Provincial Reconstruction Team run by British civilian and military 'development' experts found himself in a dispute with his mother-in-law, who had formed the view that he had kidnapped his wife (her daughter) by virtue of having failed to pay the full bride price. In fact, the woman concerned was mentally ill and had forgotten that Abdul had in fact married her daughter and paid the bride price some months previously. She reported Abdul to the local Afghan National Police checkpoint in Lashkar Gah, alleging kidnap and rape. The checkpoint commander, 'Khan' and several of his men apprehended Abdul, and over several hours beat him, causing acute pain and some internal and external injury. 'Abdul' reported the matter to the police training unit of the PRT. They considered that the matter would provide a good test case for a police complaints procedure they had instituted as part of their reform programme.
>
> The perpetrator (the checkpoint commander) requested the intervention of a group of elders from his own tribe and that of 'Abdul'. The group, or *shura*, met and discussed the case, suggesting that the police commander apologise. 'Abdul' was told that the formal system suggested by the foreign police advisors was

[844] Conversation with the education secretary to the Helmand provincial government

> inappropriate. He accepted, as he was absolutely bound to do, that he had to let the matter rest and withdrew his formal complaint.
>
> It was made very clear to him that if he elected to pursue this matter through formal channels his life would be threatened. In view of that, and not wishing to move to Pakistan, 'Abdul' did not proceed any further with his complaint. 'Abdul' states that he would not have begun to consider reporting the matter to the police had he not been an employee of the PRT and supported by police mentors.
>
> 'Khan's' checkpoint was regarded by the people living near it as a serious menace. 'Abdul' was one of many who had been dealt with in a similar fashion. As a postscript, the perpetrator of this beating, 'Khan', was killed along with six other policemen (he was the main target of the killing) some three weeks later. It is said that local people were supportive of this killing.[845]

No doubt many such cases were brought to such a conclusion. This one did not, at least as reported, involve the Taliban in resolving the dispute, though it was resolved in a violent manner. However, it was clear to all concerned that the state authorities, with whom 'Abdul' was working, were not considered to be the appropriate forum. One reason for this was that the matter was well suited for resolution in the traditional way. For this was not simply an example of what in the West might be called 'mediation': it represented Pashtunwali at work. All participants in the process were clear as to the procedure and what each party would be required to do. The politics of the perpetrators, insofar as they may have had any, were not relevant. Of rather more importance were their utility in resolving disputes.

However, 'Khan' was killed. He was killed not by the other party (or at least there is no evidence that he was) and there was no subsequent blood feud; he was killed, along with his team of Afghan National Police, by the Taliban. As one British policeman remarked at the

[845] Account taken from a contemporary report made by me, August 2007. For further such examples, see Ledwidge, 'Justice in Helmand'

time, 'this is exactly what would have happened in Cork in 1921'.[846] Here the Taliban were seen as enforcers, and their action was popular because they had removed a threat to the local people – and indeed probably to local commerce.

In her review of the 'informal' justice sector in Helmand, Kate Fearon points out that:

> Not only do the five justice providers [listed above] regularly engage in dispute resolution by themselves, but also it is more common than not to find *combinations* of these five involved in any given dispute.

She goes on to describe this as 'a la carte'.[847] There is a further problem for the 'formal' or state courts. As Fearon puts it:

> … in Helmand, the public conflates the court sector with the Government. There is a strong perception that they are one and the same. Taking a case '*to the government*' or referring to the judges as '*the government side'* are comments consistently and frequently heard when discussing these matters with Elders and with ordinary members of the community, both male and female. The concept of actual or even aspirational separation of powers between the Executive and the Judiciary simply does not exist in the public's mind. There was a strong view that the court was doing the bidding of the government, that the court was '*the government side'* of justice provision.[848]

David Kilcullen, the writer and expert on traditional counterinsurgency, says: 'We can beat the Taliban in any military engagement, but we're losing in Afghanistan not because we're being outfought but because the Afghan government is being outgoverned.'[849] The most evident manifestation of that is in the field of dispute resolution. However, it is clearly the case that the Afghan government is only one of several players. Western culture is heavily influenced by the Weberian idea of a government having a monopoly of force. Accordingly, the 'government' or the state is seen as the de facto, or perhaps default, dominant source of power and consequently justice provision.

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[846] Contemporary conversation with UK police advisor, August 2007
[847] Fearon, 'Pragmatism, proximity and Pashtunwali', p11
[848] ibid., pp14–15
[849] Kilcullen, *Counterinsurgency*, p155

In societies such as the Pashtun, this is not the case. Power and the legitimacy to settle disputes do not necessarily – or even usually – derive from the state, as is clear. However, nor is there always, as Fearon suggests, a single direct competitor. Rather, the situation may be characterised as a market, where, for some purposes, a dispute may be settled by the Taliban – a matter concerning land, perhaps, since in some provinces (as we saw in Chapter 3) a Taliban judgment has the effect of title. For a divorce case, however, the forum of choice may be the mullahs' courts in local mosques. The situation is not one, therefore, of binary conflict. One difficulty faced by counterinsurgents has been excessive adherence to the Western, urban notion of 'rule of law', as described and defined above. It might well be argued that a major error of Western intervention was to identify *legitimate courts* with state courts. A paradigm example of how this occurred was in Helmand.

At the beginning of extensive foreign involvement in Helmand in 2006, the formal justice institutions in the province had no presence outside the urban centres of Lashkar Gah and Gereshk.[850] It took several years for the importance of the 'justice sector' to be realised.

'The development of the judiciary and the rule of law is an increasing focus of ISAF', as Peter Watkins, Director Operational Policy, Ministry of Defence, put it to a session of the House of Commons Defence Committee in 2010.[851] From an ancillary element of the 'counternarcotics' effort in 2007, when I was justice advisor, justice and 'rule of law' became a major priority of the overall effort. However, whether the international effort had demonstrated a continuity of approach, or even an internal consistency, was open to question. Whether the approach that was taken was concordant with Afghan priorities is also a matter of debate.

When asked whether it was realistic to try to build a justice system in a relatively short period, using an approach that appeared to prioritise a Western approach to 'rule of law',

[850] The provincial justice institutions which report to the Supreme Court, Attorney General's Office and Ministry of Justice in Kabul, which notionally provide oversight and links to national-level justice programmes. These comprise the formal courts, the Office of the Chief Prosecutor for the province, and the various Ministry of Justice components, including the Huquq (Civil Rights) Department, the Kazai Dowlat (Land Registry Court), the Juvenile Justice Administration Department and the Prison Service

[851] Evidence of Peter Watkins to Parliamentary Defence Committee report on Operations in Helmand, http://www.publications.parliament.uk/pa/cm201012/cmselect/cmdfence/554/554.pdf, q314

Peter Rundell, the former Head of the UK's Department for International Development operations in Helmand and an extremely experienced international aid official, told me:

> We started from the Kilcullen/Petraeus idea that justice is a vital part of COIN practice. That is the why. The how was a combination of a number of things. There was a sense that there is a corpus of law, there were Afghan lawyers attached to the body of law and a certain amount of respect for it. I was struck by the way that judges talked about it: 'We are there so that the law is applied.'[852]

His view is reflected by the approach taken by the overall British mission, both military and civilian: 'The trouble is that PRT officials are often taken in by local officials ... who often see foreign officials not so much as occupiers as milch cows.'[853]

The implicit, and in Rundell's case, explicit view is that if you control the land, you control the means of delivering justice. He concedes that:

> quite a lot of the rule of law programme was a bit template based, so 'this is the establishment that a district should have'. There was indeed a lot of 'if we build it they will come'. However, we did see cases coming through the system once it was set up; but it was not possible to assess the degree of corruption ... Still, we started with only one court, and now we have courts in nine districts.[854]

The approach of international actors in counterinsurgency is to accept the fiction that the state is automatically to be aligned with counterinsurgent sentiment: 'The problem is that the conventional approach assumes that government authority and anti-insurgency sentiment go together … As a logical conclusion this conclusion may be unwarranted; a local community could be both anti-insurgency and antigovernment.'[855] The relevance of this to lawfare in insurgency zones is that, paradoxically perhaps, a release from the obligation to identify incumbent government with counterinsurgent will allow far greater flexibility of response in approach. There is no doubt that this was recognised in Helmand at least.

[852] Interview with Peter Rundell, Head of DFID in the Helmand PRT, 2009–10
[853] Interview by telephone with senior cultural advisor to UK armed forces, 26 November 2011
[854] Interview with Peter Rundell
[855] Sitaraman, *Counterinsurgent's Constitution*, p 180

Professor Graham Woodman suggests that attempting to impose state law in place of customary law can in fact act to increase conflict.[856] Indeed, he suggests that reducing the application of state law will act to reduce conflict. Should efforts be made to harmonise the two kinds of law, the 'two goods', then this should be accomplished through community action, i.e. bottom-up. Although he is concerned primarily with African mechanisms, it is argued here that the same applies in other cultures where customary law, such as the Pashtunwali, applies.

Section 3: Lessons from Afghanistan

Lack of planning for a judicial strategy

There has been a lack of planning for the judicial element of counterinsurgency. This is an issue from the highest levels of military planning to the lowest. One former senior military legal officer, who has served with UK and US military 'rule of law' missions and has dealt at the highest levels in such matters, has said:

> Rule of law is not part of the comprehensive military planning piece. It is planned, if at all, bit by bit. We need to develop a proper integrated planning process. During that process we need to have people who understand the pragmatic need for such an approach. Right now we don't have pragmatism in planning. We don't have planning at all. It is only at the last minute, or even after the last minute that military commanders get forced into this kind of planning. I don't think legal experts have been included at a high enough level.[857]

Lack of doctrinal coherence

In order for such planning to have positive effect, it needs to be integrated into a well-understood strategy, which, in turn, must be based on a practically oriented doctrine. As matters stand, counterinsurgency theory and practice is not situated within the very extensive scholarship on pluralism, based on over a century of colonial experience and on

[856] Woodman, Graham R., 'A survey of customary laws in Africa, in search of lessons for the future', Abstract available at Proceedings of Conference on Customary Law in Africa, October 2008, Gabarone, available at http://www.customarylawrevisited.com/abstracts.lc

[857] Interview with senior UK military legal officer, April 2014

more than 50 years of development work. Much of the colonial experience was founded on decades of thinking and practical strategic calculation. Much of it was geared to preventing, exploiting or ignoring what might (had current streams of counterinsurgent theory been established then) have been termed dangerous currents of 'insurgent' governance. It is not only in the counterinsurgency field that there has been a failure properly to engage with legal pluralism.

Underlying much of the West's recent efforts at justice within a counterinsurgency has been a strategic incoherence at several levels. There has first been what might be described as 'vertical incoherence', in that efforts at the provincial level were rarely (if ever) fully co-ordinated with the Afghan national plans and priorities. A British advisor to a senior Afghan minister put it like this: 'Look, the Afghan national plans are ramshackle and rickety. But they are there, and with effort could have begun to work. The countries, and I do mean here the British and Americans, carry on with their own work as if the central government did not exist.'[858] In fairness, Naina Patel, justice advisor in Helmand from 2010–11, recalls that efforts were also made to harmonise the British strategy with national strategies. There were, however, problems: 'Afghan strategies often said little, were not actually adhered to at Kabul level or were out of synch with the demands and capabilities of a province such as Helmand.'[859]

Lack of co-ordination with other activities

There is also 'horizontal incoherence' – which is to say that within the mission in Helmand itself there has been a lack of a consistent or informed approach. At the military levels, there was never a single, continuous strategic approach. For example, in Helmand the British military presence deployed in six-monthly increments of brigades,[860] each of which had different perspectives, objectives and focuses.[861] Similarly, the various civilian advisors – on justice, as on other matters – were changed at intervals of 6–18 months. The degree to which these advisors were briefed on their roles and the strategic objectives being pursued (if any) was very variable. There was no system of structured handover from one to the

[858] Interview with advisor to an Afghan minister, May 2014
[859] Interview with Naina Patel, June 2014
[860] Units of between 5,000 and 10,000 soldiers
[861] Ledwidge, *Losing Small Wars*, pp133–134

next; often it was done on a personally organised basis. One of the six justice advisors deployed to the province by the UK was given no briefings, save 'offer the people of Helmand a better deal';[862] others were given a half-page document.[863] Some justice advisors were instructed to assist the military effort in attempting to regularise detention policy; others had no involvement at all.[864] Even if the work had been coherent and consistent with an established strategy, there was little evidence of any link between proclaimed objectives of military counterinsurgency and civilian 'stabilisation' efforts. Awareness of the legal environment into which these advisors were placed was patchy at best. The tensions and dilemmas of trying to develop a coherent judicial strategy within an already intensely complex environment were perhaps exacerbated by the needs of the military counterinsurgent effort.

Naina Patel related that, insofar as there was a judicial strategy, 'It was informed by these [counterinsurgency] strategies ... However, the extent to which we should focus on other issues such as gender-based violence in the context of counterinsurgency was never really resolved.[865]

Failure to engage with the 'facts on the ground'

Corruption

Looking at matters from a Western European perspective, we assume that judges exercise judicial function and that the police are concerned with enforcing law and order. Jonathan Foreman, a researcher and expert on aid policy, calls this 'the nomenclatural fallacy':

> The term refers to the way aid officials and other foreigners often make the naive mistake of assuming that officials in poorer/developing countries who possess such titles as 'policeman', 'judge' or 'minister' have the same function as officials who bear those titles in their home countries. This is sometimes a matter of cultural

[862] Such as the author on his deployment in 2007
[863] UK justice advisor interviewed, April 2014
[864] Interviews with four of the six justice advisors deployed
[865] Interview with Naina Patel, June 2014

> arrogance; at other times it reflects the triumph of politically correct piety over experience.[866]

One UN justice advisor said that 'there was a real artificiality of office. A police chief may be called that, but he is not a police chief in the way that anyone in Europe would recognise in terms of his actual role.'[867]

A former 'stabilisation officer' in southern Afghanistan is blunt about the reality of the West's efforts:

> The predations of the state here are so extreme that no-one could reasonably expect anything other than a negative response from ordinary people who really just want to be left alone in peace with the means to make a basic living, supported by some form of locally accountable justice and, fundamentally, order. We might have done better to have bothered to figure out what such people wanted, instead of trying to impose a 'best practice' governance solution for them in the way that we have.[868]

Consequent illegitimacy

The suggestion made in some quarters that informal justice acts to undermine government legitimacy has been accepted implicitly.[869] Indeed it can undermine government legitimacy, if thought is not given to how it is used and supported. It might equally well be argued that the imposition of a system which was regarded as corrupt, yet seen as the showcase of government, did more damage. A shrewder approach to lawfare might be to take the lessons of Lugard and the British systems on the North West Frontier and adapt them to today's strictures.

One UN justice advisor with five years' experience in Central Afghanistan, and with many more years' work in Albania, the former Soviet Union and China, Jeffrey Rustand, said:

[866] Foreman, Jonathan; 'Aiding and Abetting' (Civitas 2013) chapter 7
[867] Interview with Senior UN Justice Advisor April 2014
[868] Davis, 'A bright shining narrative'
[869] Nachbar, 'Use of law in counterinsurgency', p153

> I realised I knew nothing pretty quickly. But then I had the distinct advantage of having worked, after ten years as a lawyer, in Albania. Even there it took me six months to figure out what was going on – that the chief justice was not like the chief justice in Canada … I came to Afghanistan with the full awareness that I knew absolutely nothing. Most military and many civilian officials have no experience of work in systems outside the western legal world. Many never acquire real knowledge or even an awareness of their lack of knowledge.[870]

As may be recalled, this encapsulates Thomas Carothers' 'problem of knowledge' described earlier in this chapter.

Rustand went on:

> Then there is the fact that most rule of law officers are lawyers. Many of these lawyers believe that you can abstract from all countries with 'rule of law' and pretend it's all a matter of engineering. There are also ideological reasons. For example, a *shura*'s conclusions may be rejected because they are insufficiently 'human rights compliant'. One issue which is raised time and again is gender, which is a very hard sell indeed in the Pashtun world.[871]

Focus on Western priorities

Gender is one area where the clash between traditional Afghan and Western priorities is particularly evident. Clearly, Pashtun notions of gender relations – which might be summarised as defining women as possessions – do not sit well with Western priorities. This can have very positive effects. Fearon relates the case of one local judicial council set up by the British mission to resolve disputes. Here two women were installed as members on the insistence of the British advisor. In at least one case, their presence was instrumental in avoiding appalling consequences for a very young woman. The girl concerned was being forced to marry an opium addict against her will. She stated – and this is not unusual – that

[870] Interview with senior UN justice advisor, Jeffrey Rustand, April 2014
[871] Interview with senior UN justice advisor, Jeffrey Rustand, April 2014

if forced to do so, she would kill herself, the common method being self-immolation. The case was brought to the judicial council. The initial decision to confirm the marriage was overturned on the insistence of one of the female members of the committee and the girl went to school.[872]

Peter Rundell, former head of DFID in Helmand, stated that at least one justice advisor

> had a background in community dispute resolution and worked on expanding our understanding of 'community-based dispute resolution'. She put into effect consciousness raising of their obligations under Afghan law, Sharia and human rights. Not Pashtunwali. We had a conference of elders in to spend three days talking about what they simply could not deal with. They were particularly annoyed when they were told they could not deal with murder. Trying to bring in human rights was difficult.[873]

A successor to me (and indeed to Kate Fearon) as justice advisor to the British mission, Naina Patel, recalls one seminar:

> A heated debate erupted between an elderly Pashtun judge and a persistent young man from the national human rights commission. 'Why were women in prison for running away from home?' the young man asked. It was not a crime that appeared in the penal code. 'Sharia,' answered the judge from under his imposing turban, with a glance that told the young man not to ask any more. A worried training co-ordinator, concerned at the way this exchange was going, decided to call a tea break while we discussed with the trainer how to respond. Understanding the importance of clarifying the issue, the trainer spent the remainder of the afternoon with both the code and religious text, explaining where one began and the other ended, and the centrality to both of asking why the woman had run away – adultery was clearly problematic, abuse was a very different matter. And custom, he made clear, had no basis in law.[874]

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[872] Fearon, 'Pragmatism, proximity and Pashtunwali', p32
[873] Interview with Peter Rundell, Head of DFID in Helmand, 2009–10, interviewed in November 2011
[874] Patel, Naina, 'The long road to justice in Afghanistan', *Guardian*, 15 September 2011, available at http://www.guardian.co.uk/world/2011/sep/15/long-road-justice-afghanistan

However one reads this, one is left with the distinct impression that the 'persistent young man' may not quite have gained the traction with the 'elderly Pashtun judge' that was desired by the PRT and its staff.

Yet another justice advisor, Sarah Maguire, an expert on gender rights, stressed the primacy of the formal system and, within that, particularly the vital importance of women's rights. A blog entry indicates her priorities: 'The other day, I was working with a middle-aged Afghan man discussing a forthcoming conference. Out of 100 representatives there wasn't a single woman on the list. We discussed it and he realised with a shock that he hadn't even thought to include women.'[875] The priority attached to 'gender' issues by key Afghan leaders is not the same as that attached to it by Western technical experts.

Jeffrey Rustand, the UN official quoted above, concluded his interview with me by saying:

> A big strategic mistake the West made was to try to replicate our systems; apart from the obvious stupidity of that, a second mistake was not to match our legal reforms with the Sharia. An Afghan sees the reforms – including the constitution – as a foreign imposition. Most people only know Sharia – so the Taliban come in and whatever we may think of its harshness, it is obviously Sharia. They know that. It is familiar; it is quick and you don't have to pay. We cannot compete with it. What we should have done is the really simple, but really vital stuff. We should have focused on one big, simple thing: fair dealing.[876]

On the other hand, the British government argues that there has been extensive development in its efforts to bring 'a better deal' in Helmand:

> Today, access to formal justice in Helmand is greater than it has ever been. The presence of formal justice outside the provincial capital Lashkar Gah has grown from two justice officials in 2 of the 13 districts in 2010 to 40 justice officials in 10 districts.

[875] 'Bringing justice to Helmand', http://www.blogs.mod.uk/afghanistan/2010/05/bringing-justice-to-helmand.html
[876] Interview with senior UN justice advisor (Eastern Afghanistan), April 2014

> We have also funded the construction and maintenance of secure and better run prisons that conform to international standards.[877]

This may be so, and it is undoubtedly true that the base from which work was begun was very low. How sustainable it is in an extremely corrupt, still-embattled province is unclear.[878]

The 'clash of two goods' – centralism vs pluralism[879]

In his essay on legal pluralism, the scholar on jurisprudence Ronald Janse identifies seven reasons why ideas of legal pluralism have not caught on as they might have done in legal and 'rule of law development'.[880] An overriding problem, he suggests, is that legal and rule of law reform 'can briefly be summarised as "decades of stubborn refusal to learn"', an observation exactly replicated by Jeffrey Rustand:

> I don't want to take these people's money away, but maybe someone should say 'none of this works'.[881]

One serious problem identified to me by highly experienced 'rule of law' development advisor and US law school professor Cynthia Alkon in connection with Rustand's comment is that 'practitioners say "this doesn't work" all the time.' [882] She goes on to state that 'the problem is that they say it to each other and largely in private. There are no incentives for proclaiming failure in the development world, so it is very rare for failure to be admitted.' It seems that Multi-million dollar projects must succeed, or the perception will be that the money has been wasted and that is simply not acceptable to governmental donors. Further, it is rare, with notable exceptions such as Carothers and Golub, for practitioners to enter the *academic* discourse with serious doubts to the effect that "none of this works"'

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[877] 'The UK's work in Afghanistan', Policy Paper, 14 January 2014, available at https://www.gov.uk/government/publications/uks-work-in-afghanistan/the-uks-work-in-afghanistan

[878] I asked the UK Stabilisation Unit official dealing with 'lessons learned' in the 'justice sector' for either an interview or reference to published documents. No reply was received

[879] Barfield et al., 'Clash of two goods'

[880] Janse, Ronald, 'A turn to legal pluralism in rule of law promotion', *Erasmus Law Review*,3 (December 2013), available at http://www.erasmuslawreview.nl/files/ELR_2013_03_005.pdf, p6

[881] Interview with senior UN justice advisor, Jeffrey Rustand, April 2014

[882] Interview with Cynthia Alkon December 2014

Secondly, the fact that most of those dealing with 'rule of law' reform are lawyers tends to predispose them to solutions that seem straightforward and to which they are professionally disposed, such as building courts. Third, and closely connected is the fact that this kind of work has always been based on the 'empirical [for them] assertion that only the state is capable of providing social order ... or on the ideological claim that the state offers the best hope for the realisation of economic development, democracy and rule of law'.[883] There are echoes here of H Patrick Glenn's observations on the invalidity of ideas of 'rule of law' outside, or indeed he claims, inside the Western paradigm.[884]

Fourth is the political pressure imposed by the fact that most such operations are founded on negotiations between the 'exogenous' (donor) interveners and their agents and governments, sometimes including judiciary and legislature. It is consequently understandable that high-level government officials seek assistance that helps them to strengthen the legal institutions of which they are in charge.

Fifth is the geopolitical factor of distrust of, for example, Islamic means of dispute resolution, which were seen as not sufficiently 'human rights compliant', or, even worse, may be perceived as presenting a threat cognate to terrorism.

The sixth (and closely linked to the fifth) is the normative understanding that the so-called 'thick' definition of 'rule of law', which implies the inclusion of various civil, social and political rights, is the appropriate mechanism for the delivery of dispute resolution. Ganesh Sitaraman's *Counterinsurgent's Constitution* outlines the dilemma. On the one hand: 'The rule of law is one of those few but fortunate concepts that has universal support ... To stand against the rule of law is to stand with absolutism – against democracy, prosperity, peace, order, human rights, and liberty.'[885] On the other, however, it is 'enforced by central bureaucratic institutions like national police forces and court systems. The rule of law therefore looks much like a Western legal system.'[886] As was seen in the previous chapter, at the more extreme ends of the insurgent spectrum, ideas of 'human rights' or

[883] Janse, 'A turn to legal pluralism', p8
[884] See p 173 above
[885] Sitaraman, *Counterinsurgent's Constitution*, p183
[886] ibid., p15; for a legal academic critique of the rule of law concept, see Fallon, Richard H., 'The rule of law as a contested concept', *Columbia Law Review*, 97:1 (1998)

'international standards' which cohere around the 'rule of law' are seriously contested ideas.

Finally, the seventh factor that Janse identifies is the question of mandates – a matter closely linked with the fourth factor. All organisations, such as the United Nations or the United Kingdom Government, which are involved in this kind of activity have specific mandates which render it 'difficult to engage with non-state justice systems because these are regarded as falling short of international human rights law'.[887]

I would add an eighth and connected issue – that of the pervasiveness of Western cultural assumptions, or indeed 'political correctness': '... there is an element of "right thinking"' and if you don't think that way, you're out. In private everyone knows it won't work. They know what's going on.'[888]

Behind all these features lies the 'problem of knowledge'. There is an inadequate basic knowledge of the issues which really play into the causes of insurgency and that pertain to the 'justice sector.' This is particularly the case in places that do not in any way conform to the paradigms of Western political and legal theory.

Chapter conclusion: who is the insurgent?

'There is a common assumption that strengthening states is the primary solution for a range of global and local ills, such as insurgencies.'[889]

Whether or not 'ungoverned space' is a legitimate term, the reality of intervention in differently governed places requires a deep knowledge of the nuances and practices of the area into which outsiders stray with the ambition of quelling rebellion and assisting in setting up 'governance'.

In Afghanistan, 'legal experts from North America and Western Europe frequently come across as more interested in promoting the merit of the latest legal contrivances than in making a genuine effort to promote civilian welfare'.[890] The British effort in Helmand demonstrated this at the provincial level, with regular shifts in focus, matched by an equally

[887] Janse, 'A turn to legal pluralism', p10
[888] Interview with Jeffrey Rustand, April 2014
[889] Clunan and Trinkunas, 'Conceptualising ungoverned spaces', p21
[890] Mampilly, *Rebel Rulers*, p243

incoherent Afghan national effort. The Taliban, however, were not encumbered by these 'contrivances' and maintained an entirely consistent, indeed improving, approach. Recent examples of attempts to provide a 'rule of law' element in counterinsurgency have demonstrated that, as Thomas Carothers said:

> there is a disturbingly thin basis of knowledge at every level – with respect to the core rationale of the work, the question of where the essence of the rule of law resides in different societies, how change in the rule of law occurs and what the real effects are of changes that are produced.[891]

His views are echoed by a recent UK advisor to the 'rule of law' mission in Helmand: 'We needed to understand the pushes and pulls that run the place ... we dabbled with little or no understanding of the second or third-order consequences of our actions.'[892]

Thus, the 'rule of law' practitioners have duplicated the efforts of military COIN practitioners. As Whit Mason, editor of the leading study on 'rule of law' efforts in Afghanistan, *Lost in Inaction*, told me, foreign rule of law experts were concerned with 'shaping the environment instead of shaping themselves around the environment'.[893] They were concerned with altering the status quo, whether or not they realised it. The role of 'rebel' – the agent of change – is usually that of the insurgent. Who, then, is the insurgent?

In an article in a 2013 edition of the US *Joint Force Quarterly*, Dr Robert Egnell acknowledged that 'major counterinsurgency operations have historically achieved few successes. While it is indeed possible to learn from these few successes and numerous failures, counterinsurgency principles of the past are accepted outright a bit too easily in the 21st century.'[894] His further insight was that the nature of COIN operations, particularly in Afghanistan, were not in fact *counter*insurgency; rather they were themselves rather more in the nature of insurgencies. There was a 'litany of assumptions' concerning the COIN campaign in Afghanistan.[895] He acknowledges that there was a serious problem concerning the legitimacy of the Afghan government and that Weberian democracy is not evident as an

[891] Carothers, 'Promoting the rule of law abroad', p27
[892] UK police advisor in Helmand, interviewed April 2014
[893] Interview with Whit Mason, March 2014
[894] Egnell, 'Western insurgency in Afghanistan', p10
[895] ibid., p14

objective good for all populations of the world. The 'societal transformation' that seemed to be the purpose of the mission was, in fact, a revolutionary programme and therefore was more by way of an insurgency than a counterinsurgency.

This in itself is a sound insight. Egnell goes further, however, to prescribe the conceptual tactics of *insurgents* as an option for future operation of 'regime change', should such operations take place again. It is argued here that, howsoever reframed, Robert Pape's 'It's the occupation, stupid' will still apply.[896] In other words, we return to the problem of exogenous intervention. Ashtri Surke situates 'the history of state-formation in Europe' as typically 'forged in opposition to the other', rather than imposed by that 'other'.[897] She looks at several examples of endogenous state-building, such as the Meiji in Japan or the construction of the post-imperial Turkish state, and contrasts those with what she describes as the 'extreme case of international state-building' in Afghanistan.[898] This was characterised by a lack of ownership, failing Afghan leadership and an excess of possibly unfounded optimism and a deficiency of understanding of the practical need for sustainability.

Yet state-building in the West has taken centuries. Much of the foregoing has been concerned with the sliver of 'state-building' or at the local level, what was termed 'stabilisation', as it affects the construction of a 'justice sector'. This has often been placed within the context of 'security sector reform' (SSR) a truly vast industry within the international development world. It is argued here that this is a category error of an archetypical kind. 'Justice' in societies such as Afghanistan, Somalia or indeed any culture with a strong customary strain, is far more than an arm of the security forces, as indeed it is in Western societies. This category error has in turn bred an approach which has tended to relegate to the margins the far more important function of internal societal dispute resolution. Introducing elements foreign to the 'target' society – such as overlaying a formal justice sector along Western lines – has produced instabilities and internal conflicts, and has

[896] Pape, 'It's the occupation, stupid'

[897] Surke, 'Exogenous state-building', p227

[898] ibid., p237

in fact made the security situation worse. It has built in, for example, further opportunities for theft, graft and corruption by state officials.[899] One former 'stabilisation officer', speaking about Afghanistan (where he works) expresses the views of some who have worked in such places:

> In short, public office is not regarded as a service to the people but as a means to extract resources from them. The state is a predatory, self-serving and hostile actor and not something that adds value to people's lives through the provision of public goods.[900]

The combination of officials knowing that this is the case and yet continuing to add resources and opportunities for the same officials within that system may be considered to be an example of cognitive dissonance. This, in turn, has acted to reduce the legitimacy of the 'formal' state, which was already at avery low ebb. 'To be legitimate and effective, legal reform has to relate to the normative basis of justice in Afghanistan.'[901] This was realised by legal reformers after the unfortunate experiences in the former Soviet Union in the late 1990s. The lessons of colonial authorities were never (or only rarely) examined. The 'breathtakingly mechanistic approach'[902] based on the notion that 'a country achieves the rule of law by reshaping its key institutions to match those of countries that are considered to have the rule of law'[903] has resulted in the Taliban taking the lawfare initiative and using their considerable edge to great strategic effect, both in terms of the operational effect on the ground, where the formal sector has essentially been defeated in key areas, and in terms of the wider narrative of 'justice', which is dominated by their rhetoric and indeed to a very great extent backed up by reality.

The problems and questions arising from 'rule of law' activities in places such as Afghanistan could and will arise in other areas of governance, such as education. Those areas, however – important and indeed vital though they are – are unlikely to impact on the fight for legitimacy that lies at the heart of the recent Afghan war and that has lain at the heart of other military and 'stabilisation' missions for much of the last decade.

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[899] See, for example, the 'Juant Case', reported in detail in Ledwidge, 'Justice in Helmand'
[900] Davis 'Bright Shining Narrative'
[901] Surke, 'Exogenous state-building', p244
[902] Carothers, Thomas, 'Promoting the rule of law abroad', p21
[903] ibid., p21

Conclusion

The main research question seeks to determine: **How does the use of courts and dispute resolution systems as characterised in the term 'lawfare' impact on the conduct and outcome of insurgency?**

'In large measure, our modern politics is legal politics. The terms of engagement are legal, and the players are legal institutions, their powers expanded and limited by law. To say that war is a legal institution is not only to say that war has also become an affair of rules or the military a legal bureaucracy; it is also to say something about the nature of the politics continued by military means.'[904]

Wars are horrific ways of making decisions, but they *are* ways of making decisions; and for that reason they can be thought of as a form of legal procedure. After all, law is nothing other than the science of making decisions.[905] At the outset of this thesis, the objective was to attempt to show that if war was once a form of legal process, then might the law not now be seen as at least a form of war? Perhaps even, as the father of the term 'lawfare', Charles Dunlap, has said, the 'decisive element'?[906]

Ultimately, insurgency and counterinsurgency are political acts; they constitute a form of warfare – indeed arguably the dominant form of warfare in the current international strategic environment. As such, if they are to succeed there should be a strategic appreciation made of the objectives, means and methods suited to the conflict. This has rarely been done in recent years. However, over the decades of the colonial period there developed a close appreciation of the need for such a strategy. There was a lengthy debate conducted by all levels of those involved, ranging from the practitioners on the frontiers themselves to the politicians deciding upon such strategies. Such awareness has not been evident over the last two decades.

[904] Kennedy, *Of War and Law*, p13
[905] Whitman, *Verdict of Battle*, p23
[906] Dunlap, 'Lawfare', p34

The question is raised in Chapter 1 as to whether there is a relationship between successful counterinsurgents and fair procedure. The case made in this thesis is not that this is a silver bullet or an undiscovered mine of counterinsurgency treasure; rather that there should be a legal policy that goes beyond the rhetorical and that moves into the practical. This is where an overall strategic perspective may help.

This comes against the background of an awareness of war as a multidimensional endeavour. The consequences of appreciating this are severe, if ruthlessly logical. If the courts of the 'occupying power' lack legitimacy, then they must be attacked. Clearly this can be done virtually, by setting up insurgent courts. The Irish Nationalists showed that it must also be done physically, by ensuring that the courts could not function – either by threatening or suborning staff or witnesses, or by destroying the buildings.

In Northern Ireland in the 1970s to the 1990s, this was always an option for the IRA. There was a key practical obstacle to this. Northern Ireland was over 60 per cent Unionist, and to have followed that route would have served no purpose but to alienate even further an already hostile majority. The Ireland of the early twentieth century was essentially Nationalist in nature, at least in those areas where the IRA and Sinn Fein, along with their courts, operated – not coincidentally with some success. The mechanisms in formal justice and the strategic options available to counterinsurgents in a more traditional setting are discussed in Chapter 2. The evidence would seem to indicate that it is important to have fair dealing in detention and trial procedures. For example, there was little scope left in Malaya for MPLA insurgents to fill a gap in justice provision, although, as pointed out in Chapter 2, this may have had more to do with the constant military and police pressure to which they were subject.

However, not 'dealing fairly' leaves the way open for the insurgent to move in with what might now be called 'information operations', as we have seen at the grand strategic level with respect to Guantanamo and other detention issues in the 'Long War'. In a rather earlier generation in Northern Ireland, the Diplock Courts were presented (not without some justification) as being a derogation from basic notions of fairness, as understood in British law. Did the costs in legitimacy outweigh the gains from putting terrorists in jail? It may be

so. This is a contingent circumstance and a clear-eyed stance needs to be taken at the outset to the legal approach to fighting insurgents. Taking an ad hoc approach to matters of detention and interrogation and the litigation procedures to which insurgents are subject lays the counterinsurgents open to the threat of legal action at home, lawfare in the way that it is traditionally understood.

As Porch has said in his recent *Counterinsurgency*, each war (and its results) is contingent upon circumstances. Each is, as it were, a law unto itself. Lessons to be drawn from Kenya are not necessarily to be applied to Malaya, or vice versa, save and insofar as it is necessary to have complete familiarity with the drivers and issues that the enemy relies upon.

The importance of procedural fairness lies in the sources of a conflict. For example, the land issues in Ireland, which for centuries drove many of the problems, were of a different nature from those in Afghanistan. However, mechanisms needed to be in place in order for those root causes to be dealt with. Failure to do so in Kenya and Ireland opened the way, especially in Ireland, for insurgent authority to begin to gain purchase on dispute resolution mechanisms, courts, which eventually became a key strategic weapon, as seen in Chapter 3. A similar gap in legitimacy opened the way for the Taliban in Afghanistan, both in the 1990s and more recently, to build their own 'brand' and to start (or continue) the process of developing a message that they were to be preferred to the government by those engaged of necessity in 'forum-shopping'. While from the Western perspective the Afghan War is over, it certainly is not over for the Afghans. That theatre of justice will continue to play itself out. The nostrums of 'formal justice' on the Western model have clearly failed, as they do not live sufficiently well with Afghan culture and are considered to be part of the intensely corrupt Afghan government.

What was and is the 'message' of insurgent courts? It is simple: by these instruments, insurgents demonstrate that they have the legitimacy to exercise one of the key functions of government. They demonstrate that they possess the authority to dispose of disputes, not only among the members of their own groups, but among the members of the community they serve. The judicial system is where the mettle of claims to legitimacy and the right to

govern is proved. It is, as it were, where the rubber of government meets the road of the people.

Once a belligerent group has got hold of the courts in a particular disputed area, it is very difficult for the opposing party to dislodge it. By 'courts', one means here the ability to decide disputes. The reason, as Ireland and Afghanistan have shown, is that the ability to decide disputes is an indicator of public trust not so much in propriety, as in ability to enforce, and is therefore an indicator of legitimacy. Commercial, farming and business interests understand the situation better than 'COIN practitioners'. In one sense, courts are an expression of the 'wisdom of crowds', as to some extent the decision as to what forum to use is a speculative one. For example, in the key issue of land, there is no interest in decisions that are only of temporary effectiveness. The party that aspires to 'win' in an insurgency needs to be able to enforce its will, and one vital characteristic of that is the ability to enforce the judgments of their courts.

Overall, however, counterinsurgents, whether conducting their campaigns as endogenous or exogenous interveners, need to be aware of the requirement for a legal strategy – not just of how to use courts to counter insurgents, in other words as part of a security apparatus. They also need to look at what may be needed to deal with the edge that insurgents may have in the area of dispute resolution. The ideas presented in current doctrinal documents are clearly inadequate, and have been shown to be so in Afghanistan. This gap in policy has been shown to be particularly obvious in relation to 'ungoverned space'. In fighting wars of this nature, doctrinaire approaches based on Western notions of 'rule of law' are ineffective, based as they are on premises that simply do not apply in 'ungoverned space'. More thinking is required as to how the lessons of recent campaigns (and indeed older campaigns) can be developed. Much of that may draw on scholarship in legal anthropology.

It is also argued here that, regarded through the lens of justice, the kind of thinking that founds such documents as FM 3-24 is also profoundly conceptually flawed. This problem goes deeper than merely being an update of tired and anachronistic notions of 'hearts and minds' or 'winning the population' or, for that matter, 'governance'. Those templates are irrelevant in places where 'government' is not seen as a solution.

How should counterinsurgency theory cope with 'rupture strategy', forms of which range from the simple denial of authority or legitimacy, to using the courts to set a narrative tone for the conduct of counterinsurgency (as some may argue has happened pursuant to the cases in the UK dealing with detention)? One obvious tactic would be to ensure that this particular vulnerability, in this case concerning detention, is properly legally founded both at home and in the area of operations.

Such essential matters are not dealt with in current doctrine. The version of judicial strategy preferred by current 'counterinsurgency doctrine' is the standard 'rule of law' model, which is inappropriate in pluralist settings.

Yet there is very extensive scholarship, indeed a whole field of academic discourse, which is inclined to show precisely the contrary – the field of legal pluralism:[907] namely that 'the absence of a strong state will necessarily be followed by anarchic conditions'.[908] This is not necessarily so.

The second research question asks: W**hat does the use of courts and dispute resolution mechanisms tell us about the validity of contemporary counterinsurgency ideas as a doctrine or set of tactics?** One simple answer is that there needs to be a profound rethink. Perhaps on the following framework:

1 Counterinsurgents must understand that insurgents have agency, and will seek to out-govern, too. That is the nature of subversion and it is probably beginning to be understood. The counterinsurgent also needs to understand that 'the people' are not objects: they too have agency and dynamism.

2 It pays insurgents to set up fair dispute resolution systems with enforcement mechanisms and minimal corruption; they thus parlay local dispute resolution into 'rule of law' and political power. They are engaged in garnering legitimacy gained through resolving disputes, delivering judgments in a way that is felt to be fair, and ensuring that those decisions are enforced by their own rule of law.

[907] See, for example, *Journal of Legal Pluralism*, the entire run of which is available at http://www.jlp.bham.ac.uk/volumes/index.htm
[908] Mampilly, *Rebel Rulers*, p7

This, in due course, has the potential to grow into political power, the objective of insurgency.

3 Accordingly, to deny insurgents the purchase they require and (if they receive it) will exploit, it pays counterinsurgents to deal fairly with land or other pressing legal issues, either with strong, relevant, well-informed legislation, or else appropriate mechanisms of redress. It pays counterinsurgents to deal apparently fairly with security cases.

4 It pays counterinsurgents to ensure that a dispute resolution system goes with the grain of the country within which it is situated. This will require an understanding of the legal ecology of the environment within which they work.

5 It pays counterinsurgents to ensure that the legal framework within which they operate is as legally watertight as possible, both at home and in the area of operations.

6 It pays counterinsurgents to ensure that decisions fairly arrived at, in compliance with local custom, are enforced.

Implications for policy

The third research question examines: **What in terms of 'judicial strategy' can assist intervening powers to succeed in their objectives?**

Clearly there needs to be a full awareness of what it is that the counterinsurgent is trying to achieve, and a clear-eyed understanding that there may be internally conflicting objectives: for example, a national policy of gender promotion that is in direct opposition to the interest in ensuring that deeply held ideas are not challenged to the detriment of the overall mission.

The 'legal flank' may not always be open. US military lawyer Thomas Nachbar has this to say:

> To say counterinsurgents can use law to fight insurgents is not to say that they should ... Both law and war have been around for as long as there have been governments, and the lessons we are learning in today's counterinsurgency and counterterrorism campaigns will likely play out for generations as, in each new conflict, law finds its place as both a constraint on war and a means of warfare.[909]

It is clear that there is far more awareness than there was of the importance of developing a soundly based judicial strategy. What is equally clear from recent practice is that, while this need has been identified by counterinsurgents, or many counterinsurgents, it has not been fulfilled in practice. Another scholar of counterinsurgency criticises Western counterinsurgency more generally, but his critique is just as valid for present purposes: 'When a state gets its strategy right in war, tactical problems tend to be subsumed and improved within it ... But when a state fights a war under a botched strategy – as the United States is currently doing in Afghanistan – that fiction is exposed and laid bare with nothing for cover.'[910]

It may well be that, even after the setbacks of the last decades, there remains some validity in the dicta of counterinsurgency theory. However, as observed in Chapter 1, there remains very little coverage of the legal means available to insurgents, or indeed counterinsurgents, in prosecuting their operations. While there are the beginnings in stabilisation theory of an understanding of the importance of law and institutions of dispute resolution, this has not yet migrated across to the world of counterinsurgency beyond tired notions of 'rule of law' development and 'security sector reform'.

Equally, while there is most certainly a greatly increased global awareness of the potential for lawfare within the context of state-to-state conflict, the discussion of lawfare has largely been confined to questions surrounding detention and interrogation of 'terrorist' suspects or the methods available to human rights activists in restraining the use, for example, of drones. Certainly these have relevance to the prosecution of counterinsurgency, but they do

[909] Nachbar, 'Use of law in counterinsurgency', p164
[910] Gentile, *Wrong Turn*, p117

not speak of the need to deal with insurgency at the operational legal level, let alone the strategic level. To adopt an aphorism: while we have been playing draughts, our adversaries have been playing chess.

At that level, the discourse remains at the default of building legal institutions ('rule of law field force', etc.). As was seen in Chapter 1, in the case of occupations current international law allows a great deal of latitude, and therefore scope for initiative and original thought for the occupying power.

To get beyond that paradigm there will need to be a new approach to the planning of operations. A start could be made by including a legal element within 'intelligence preparation of the battlespace'. This idea lives well within advanced conceptions of intelligence. For example, in his 'Fixing Intel', General Michael Flynn, former ISAF Chief of Intelligence and current head of the Defence Intelligence Agency, advocates taking intelligence away from the centrality of 'covert intelligence' and rendering it far more 'holistic' in nature, to include the legal battlespace.[911]

Finally, there must be an increased awareness of the multidimensional nature of war and along with it an increasing awareness of the multidimensional implications of law and war. Potential conventional opponents already have this awareness,[912] and insurgent opponents have been, as this thesis has sought to demonstrate, been aware of it for far longer.

[911] Flynn, Michael T., Pottinger, Matt and Batchelor, Paul, 'Fixing Intel: A blueprint for making intelligence relevant in Afghanistan' (Centre for a New American Security, 2010); see also General Flynn's lecture at the Brookings Institution, 13 November 2013, podcast available at http://www.lawfareblog.com/2013/11/lawfare-podcast-episode-50-dia-chief-lt-general-michael-t-flynn-speaks-at-brookings/

[912] See Qiao Liang and Wang Xiangsui, *Unrestricted Warfare* (PLA Literature and Arts Publishing House, Beijing, 1999), available at http://www.cryptome.org/cuw.htm

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Ahmed Tassal Helmandi Journalist

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[913] Interviews conducted under Research Ethics application REP (WSG)/09/10-7 approved 17th December 2009

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